(14)

No. 00-1214-CSY
Status: GRANTED

Title: Alabama, Petitioner
v.
LeReed Shelton

Docketed:
January 29, 2001

Court: Supreme Court of Alabama

Counsel for petitioner: Morman,Stephanie N.

Counsel for respondent: Mills,William H.

NOTE: See mail label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Jan 25 2001	G	Petition for writ of certiorari filed. (Response due February 28, 2001)
2	Mar 7 2001		DISTRIBUTED. March 23, 2001 (Page 2)
3	Mar 16 2001	F	Response requested -- SOC.
4	Apr 4 2001		Brief of respondent LeReed Shelton in opposition filed.
5	Apr 17 2001		REDISTRIBUTED. May 10, 2001 (Page 1)
6	May 14 2001		Petition GRANTED. SET FOR ARGUMENT February 19, 2002. **********
7	Jun 25 2001		Order extending time to file petitioner's brief on the merits to and including July 19, 2001.
8	Jul 19 2001		Joint appendix filed.
9	Jul 19 2001		Brief of petitioner Alabama filed.
10	Jul 19 2001		Brief amici curiae of Texas, et al. filed.
11	Aug 14 2001		CIRCULATED.
12	Aug 17 2001		Brief of respondent LeReed Shelton filed.
13	Aug 24 2001		Record filed.
	-	*	Record proceedings Supreme Court of Alabama (1 volume).
14	Aug 29 2001	G	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
16	Sep 17 2001		Letter from counsel for the respondent received and distributed.
15	Sep 19 2001	X	Reply brief of petitioner Alabama filed.
17	Sep 24 2001		Motion of Texas, et al. for leave to participate in oral argument as amicui curiae and for divided argument DISTRIBUTED.
18	Oct 1 2001		Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
29	Oct 11 2001	G	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
20	Oct 18 2001		This case is removed from the November 2001 Argument Calendar. Charles Fried, Esquire, of Cambridge, Massachusetts, is invited to file a brief, and to argue, as amicus curiae, in opposition to the judgment below and in support of the following position: where counsel is not afforded to an indigent defendant, the Constitition of the United States does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant

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No. 00-1214-CSY

Entry	Date	Note	Proceedings and Orders
			might be incarcerated in the event probation is revoked. The brief as amicus curiae is to filed with the Clerk and served upon the parties on or before 3 p.m., Monday, December 10, 2001. Any response by the parties may be filed with the Clerk and served upon opposing parties and amicus curiae on or before 3 p.m., Friday, January 11, 2002. Rule 29.2 is suspnded in this case. Ten minutes of petitioner's time are allotted to Mr. Fried for oral argument.
30	Oct 29 2001		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae GRANTED.
22	Nov 1 2001	G	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Dec 7 2001	X	Brief amicus curiae of Charles Fried by invitation of the Court filed.
24	Dec 14 2001	D	Motion of petitioner for additional time for oral argument filed.
26	Jan 7 2002	X	Reply brief of respondent to brief of amicus curiae Charles Fried filed.
27	Jan 10 2002	X	Reply brief of petitioner Alabama to brief of amicus curiae Charles Fried filed.
28	Jan 10 2002	X	Reply brief of Natl. Assn. of Criminal Def. Lawyers to brief amicus curiae filed.
33	Jan 22 2002		Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: 20 minutes for respondent and 10 minutes for amicus curiae.
34	Jan 22 2002		Motion of petitioner for additional time for oral argument DENIED. The order of October 1, 2001, granting the motion of Texas, et al., for leave to participate in oral argument as amici curiae and for divided argument is rescinded.
35	Feb 19 2002		ARGUED.

Supreme Court, U.S.
FILED
001214 JAN 24 2001
OFFICE OF THE CLERK

No. 00-____

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the light of the "actual imprisonment" standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and refined in *Scott v. Illinois*, 440 U.S. 367 (1979), does the imposition of a suspended or conditional sentence in a misdemeanor case invoke a defendant's Sixth Amendment right to counsel?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The State of Alabama respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court vacating the defendant's suspended sentence as violating his Sixth Amendment right to counsel.

DECISIONS BELOW

The decision of the Alabama Court of Criminal Appeals can be found at *Shelton v. State*, CR-97-1313, 1999 WL 339284 (Ala. Crim. App. May 28, 1999) (Pet. App. 6–24). The decision of the Supreme Court of Alabama is found at *Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000) (Pet. App. 27–37).

STATEMENT OF JURISDICTION

The decision of the Alabama Supreme Court vacating Shelton's suspended misdemeanor sentence was entered on May 19, 2000. A petition for rehearing was denied on October 27, 2000. Pet. App. 40–44. The State invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The State of Alabama submits this petition to obtain review of a decision by the Alabama Supreme Court holding that the receipt of a suspended sentence in a misdemeanor case invokes a defendant's Sixth Amendment right to counsel. Adjudication of this issue in federal circuit courts and state courts has led to conflicting outcomes. The majority of federal circuit courts and state courts agree that a probationary or suspended sentence merely amounts to a "threat of imprisonment" and does not mandate appointment of counsel. This split of authority, coupled with the importance of establishing a uniform guideline for evaluating Sixth Amendment claims, necessitates certiorari review.

After LeReed Shelton (Shelton) was adjudged guilty of third degree assault, a misdemeanor offense, while representing himself in the Etowah County District Court

of Alabama, Shelton appealed the conviction for a trial de novo in circuit court. (C. 2, 12.)[1] Shelton proceeded, pro se, to trial in the Etowah County Circuit Court, where a jury convicted him of the same crime. (C. 2, 12; R. 2.)[2] The trial judge sentenced Shelton to serve thirty days in the Etowah County Detention Center, then suspended the term, imposing two years' unsupervised probation. (C. 16.) As a condition of probation, Shelton was required to pay various financial levies to the clerk within thirty days. (C. 16.)

In the Alabama Court of Criminal Appeals, Shelton asserted his misdemeanor conviction was void because he did not waive his right to counsel. Although the Alabama Court of Criminal Appeals initially agreed with Shelton, Pet. App. 3–4, after a remand of the case, the court reversed its decision, ruling that a defendant is not constitutionally entitled to counsel for a misdemeanor offense in which a suspended or conditional sentence is imposed, Pet. App. 7–12.

Shelton filed a petition for a writ of certiorari in the Supreme Court of Alabama, which the court granted on December 13, 1999. In a 6-to-1 decision, the Alabama Supreme Court affirmed Shelton's conviction, but reversed his thirty-day suspended jail term. Pet. App. 27–37. Finding that "[n]either *Argersinger* nor *Scott* addressed the issue . . . whether a suspended or probated sentence to imprisonment constitutes a 'term of imprisonment[,]' " the supreme court considered conflicting federal and state decisions on the issue. Pet. App. 33–34. The Alabama Supreme Court, selecting the reasoning expressed in *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991), that a conditional threat of imprisonment imposed in an uncounseled misdemeanor

[1] "C." refers to the clerk's record on appeal.
[2] "R." refers to the court reporter's transcript.

case "could never be carried out" and thus, was "invalid," ruled that Shelton "was entitled to representation by counsel because he was sentenced to a term of imprisonment, albeit suspended." Pet. App. 33–35. "Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel," and discovering no evidence in the record that Shelton " 'was offered counsel[,]' " the supreme court "found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right . . . [and] reverse[d] that aspect of his sentence imposing 30 days of suspended jail time." Pet. App. 35–37. In dissent, Justice Maddox asserted that, "because the defendant received only a suspended sentence and was not incarcerated . . . he . . . [did not have] a right to counsel." Pet. App. 38–39. The State filed an application for rehearing, which the Alabama Supreme Court denied on October 27, 2000. Pet. App. 40–44.[3]

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[3] The Alabama Supreme Court slightly modified its original opinion on rehearing by including additional commentary in its second footnote; this information has been added to the court's May 19, 2000, released opinion.

REASONS FOR GRANTING THE PETITION

I. FEDERAL CIRCUITS AND STATE SUPREME COURTS ARE DIVIDED AS TO WHETHER IMPOSITION OF A SUSPENDED OR CONDITIONAL SENTENCE IN A MISDEMEANOR CASE INVOKES A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Commencing with the decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), this Court determined that the "actual deprivation of liberty" invoked the Sixth Amendment right to counsel. *Id.* at 32–34, 40. In *Scott v. Illinois*, 440 U.S. 367 (1979), this Court unequivocally embraced "actual imprisonment as the line defining the constitutional right to appointment of counsel" and rejected the "mere threat of imprisonment" as invoking that guarantee. *Id.* at 373. *Scott* was recently reaffirmed in *Nichols v. United States*, 511 U.S. 738 (1994), where this Court extended the "actual imprisonment" requirement by recognizing the validity of "an uncounseled misdemeanor conviction" as it was "used to enhance punishment at a subsequent conviction." *Id.* at 748–49. Likewise, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), while discussing indigents' access to the courts, this Court emphasized the right to counsel "does not extend to nonfelony trials if no term of imprisonment is actually imposed." *Id.* at 113.

The Second, Fourth, Fifth and Sixth Circuits and the supreme courts of Michigan, Virginia and Montana have strictly construed the *Scott* "actual imprisonment" standard, holding that a defendant is not constitutionally entitled to counsel in a misdemeanor case where a suspended or conditional sentence is imposed. Conversely, the Eighth and Tenth Circuits and the supreme courts of Alabama and Vermont have reasoned that imposition of a suspended or conditional sentence

mandates legal representation. These conflicting judgments have resulted in incongruous rationales and outcomes in the federal circuit courts and state supreme courts. Based on the inconsistent results among these courts, this Court should grant certiorari to resolve whether a defendant who receives a suspended or conditional sentence in a misdemeanor case is entitled to legal representation.

Before this Court's decisions in *Scott* and *Nichols*, the Fifth Circuit held that a definite loss of liberty was required before a defendant was entitled to counsel in a misdemeanor case. *Cottle v. Wainwright*, 477 F.2d 269, 275 (5th Cir. 1973), *vacated on different grounds*, 414 U.S. 895 (1973). In *Cottle*, the Fifth Circuit held that the Florida Parole Commission could use an uncounseled North Carolina conviction that had resulted in a 20-day suspended sentence to revoke parole. Building on the statements in *Argersinger* that counsel was only required when a misdemeanor "en'l[ed] up in the actual deprivation of a person's liberty," 407 U.S. at 40, the Fifth Circuit upheld the validity of the uncounseled misdemeanor conviction, ruling that a suspended sentence is not tantamount to "actual imprisonment." *Cottle*, 477 F.2d at 275.

The Second, Fourth, and Sixth Circuits agree with the Fifth Circuit, reasoning that a probationary or suspended sentence merely amounts to the "threat of imprisonment," which this Court rejected as meriting counsel in *Scott*. *United States v. Castro-Vega*, 945 F.2d 496, 499 (2d Cir. 1991) (uncounseled prior misdemeanor resulting in probationary sentence used to calculate criminal history at sentencing), *cert. denied*, 507 U.S. 908 (1993); *United States v. Jackson*, 605 F.2d 1319, 1320 (4th Cir. 1979) (no right to counsel with imposition of 90-day probationary sentence for a misdemeanor assault); *United States v. Smith*, No. 94-5627, 1995 WL 314892, at *2 (6th Cir. May

23, 1995) (unpublished opinion) (prior uncounseled misdemeanor conviction resulting in suspended sentence used to calculate criminal history), *cert. denied*, 516 U.S. 897 (1995). The Eleventh Circuit accepts the decisions of the Fifth Circuit as binding precedent,[4] and, thus, joins the Second, Fourth, Fifth, and Sixth Circuits in accepting that a conditional or suspended sentence is not "actual imprisonment." *Cf. United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988) (sentencing court may consider uncounseled misdemeanor convictions where defendant was not imprisoned).

In addition to these circuit courts of appeals, the supreme courts of Michigan, Virginia and Montana construe *Scott*'s "actual imprisonment" language to indicate that, absent incarceration for a conviction, no counsel is mandated. *People v. Reichenbach*, 587 N.W.2d 1, 3–7 (Mich. 1998) ("The plain meaning of the words 'actual imprisonment,' as well as the words 'mere threat of imprisonment,' dictate the conclusion that defendant's conditional sentence did not constitute 'actual imprisonment.' "); *Griswold v. Commonwealth*, 472 S.E.2d 789, 789–91 (Va. 1996) (defendant's previous uncounseled misdemeanor conviction resulting in suspended sentence was not "actual imprisonment"); *State v. Hansen*, 903 P.2d 194, 197 (Mont. 1995) (holding suspended sentence does not create a constitutional right to counsel).

In stark contrast, the Eighth and Tenth Circuits hold that a suspended sentence demands appointment of counsel. *United States v. White*, 529 F.2d 1390, 1393-1394 n.4 (8th Cir. 1976) (striking 90-day suspended

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit held that "the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981 . . . shall be binding precedent in the Eleventh Circuit."

sentence imposed in uncounseled misdemeanor case); *United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (striking suspended sentence of imprisonment in uncounseled case). The Alabama Supreme Court and the Vermont Supreme Court have joined this faction. Pet. App. 33–35; *State v. Brown*, 676 A.2d 350, 354 (Vt. 1996) (defendant cannot be denied appointment of counsel, then subsequently receive a suspended sentence).

This Court established the unequivocal benchmark of "actual imprisonment" as triggering the right to counsel in misdemeanor cases. The minority position, adopted by the Alabama Supreme Court, disregards that standard and invites reversal. This Court should grant certiorari to resolve the conflict among the federal circuit and state supreme courts.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL REQUIRES A NATIONALLY UNIFORM INTERPRETATION.

This Court has repeatedly drawn a prominent distinction in misdemeanor cases between the "mere threat of imprisonment" and the imposition of "actual imprisonment." Two federal circuit courts and two supreme courts, including the Alabama Supreme Court, have enlarged defendants' right to counsel by failing to apply the *Scott* bright-line "actual imprisonment" test, and in so doing, have undermined, and will continue to undermine, this Court's intent to avoid the imposition of counsel in the "run of misdemeanors."

Inconsistencies in the *Scott* interpretations among federal circuit courts and state supreme courts lead to disparate results and inequitable treatment of defendants based solely on the jurisdiction where misdemeanor prosecution occurs. Such discrepancies thwart

consistency of punishment and upset the efficacy of this Court's precedent.

The State of Alabama urges this Court to grant certiorari and reverse the decision of the Alabama Supreme Court to resolve the existing conflicts and to ensure a nationally uniform interpretation of the right to counsel in misdemeanor cases when the sentence imposed is suspended or probated.

CONCLUSION

The petition for a writ of certiorari to the Alabama Supreme Court should be granted.

Respectfully submitted,

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January 25, 2001

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1997-98

CR-97-1313

Released October 2, 1998

Lereed Shelton
v.
State
Appeal from Etowah Circuit Court
(CC-97-0365)

BASCHAB, JUDGE

The appellant, Lereed Shelton, was convicted in district court of third-degree assault, §13A-6-22, Ala. Code 1975. He appealed his conviction to the Etowah Circuit Court for a trial de novo, and he was again convicted of third-degree assault. The circuit court sentenced him to 30 days imprisonment, but suspended the sentence and placed him on

unsupervised probation for two years. The circuit court also ordered the appellant to pay $516.69 restitution as a condition of his probation. This appeal followed.

I.

The appellant argues that the prosecutor's complaint was void because it did not allege an essential element of third-degree assault. Specifically, he contends that the complaint was deficient because it did not include the language "to another person" in describing the intent element of the offense. The complaint alleged that the appellant,

> "with the intent to cause physical injury and did cause physical injury to Kenney L. Campbell by beating him with his fist, in violation of 13A-6-22 of Code of Alabama 1975."

(C.R. at 13.) Section 13A-6-22, Ala. Code 1975, provides:

> "(a) A person commits the crime of assault in the third degree if:
>
> > "(1) With intent to cause physical injury to another person, he causes physical injury to any person."

"[A] complaint that substantially tracks the language of the statute is sufficient to inform the defendant of the charges against which he must defend." Gentile v. City of Guntersville, 589 So.2d 809, 810 (Ala. Cr. App. 1991) (emphasis added). Although a minor variation between the language in the complaint and the language of §13A-6-22, Ala. Code 1975, exists, the complaint substantially tracks the language of the

statute. Furthermore, the complaint contains sufficient facts and a sufficient description of the elements to " 'inform the [appellant] of the charge so that [he] may prepare a defense and invoke the Double Jeopardy Clause when appropriate.' " See Hunt v. State, 642 So.2d 999, 1022 (Ala. Cr. App. 1993), aff'd, 642 So.2d 1060 (Ala. 1994) (quoting Daniel F. McInnis et al., Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992, 81 Geo. L. J. 853, 1076-81 (1993)). The complaint does not include the words "to another person" in regard to intent. However, the language of the complaint was sufficient to apprise the appellant that the intent to cause physical injury was an element of the offense of third-degree assault so that he could formulate a defense to that charge. Because the complaint contains all the essential elements of the charge, it is valid.

II.

Next, the appellant argues that his rights were violated because the record does not reflect that he knowingly, intelligently, and voluntarily waived his right to counsel. The State argues that the appellant did not have a right to counsel. Therefore, it argues that no waiver was necessary. The appellant was convicted of third-degree assault, a Class A misdemeanor. See §13A-6-22, Ala. Code 1975. The right to counsel does not attach in a misdemeanor case if " ' "the defendant is not sentenced to a term of imprisonment. If an uncounseled defendant is sentenced to prison [or jail], the conviction itself is unconstitutional." ' " Williams v. City of Phenix City, 659 So.2d 1004, 1005 (Ala. Cr. App. 1995) (quoting Minnifield v. City of Alexander City, 616 So.2d 403 (Ala. Cr. App. 1993)); see also Rule 6.1, Ala. R. Crim. P., committee comments (stating that "the right to

counsel in misdemeanor cases is limited to cases in which the defendant is actually sentenced to jail"). The circuit court sentenced the appellant to 30 days imprisonment, but suspended the sentence and conditioned probation on the payment of fines, costs, and restitution. The constitutional right to counsel applies in misdemeanor cases where the appellant's sentence of imprisonment is suspended conditionally. Williams v. City of Phenix City, 659 So.2d at 1006 (holding that "a conditionally suspended sentence of imprisonment cannot be imposed on an indigent [in a misdemeanor case] who is denied counsel"); see also Culberson v. State, 709 So.2d 1327 (Ala. Cr. App. 1997) (holding that Culberson, who had been sentenced to two suspended terms of imprisonment, had a constitutional right to counsel). Therefore, the appellant had a constitutional right to counsel.

"A defendant may always waive the right to counsel but 'the waiver must be intelligently and understandingly made, and [the court] cannot assume that to be the case from a silent record.' " Culberson, 709 So.2d at 1328 (quoting Lake v. City of Birmingham, 390 So.2d 36, 38 (Ala. Cr. App. 1980)); see Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). " ' "If the record is not clear as to the defendant's waiver [of counsel] and request of self-representation, the burden of proof is on the State" ' " to show the waiver was knowing, intelligent, and voluntary. Watkins v. State, 708 So.2d 236, 240 (Ala. Cr. App. 1997) (emphasis omitted). Nothing in the record indicates that the appellant knowingly, understandingly, and voluntarily waived his right to counsel. Therefore, we remand this case for the circuit court to determine whether the appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. The circuit court shall take the necessary action to see that the circuit clerk makes due return to

this court at the earliest possible time and within 42 days of the release of this opinion. The return to remand shall include any transcripts or documents that support the circuit court's findings.

REMANDED WITH INSTRUCTIONS.

Long, P.J., and McMillan, Cobb, and Brown, JJ., concur.

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STATE OF ALABAMA - - -
JUDICIAL DEPARTMENT

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1998-99

Released May 28, 1999

CR-97-1313

Lereed Shelton
v.
State
Appeal from Etowah County Circuit Court
(CC-97-365)

On Return to Remand

COBB, JUDGE

This case was originally assigned to another judge. It was reassigned to Judge Cobb on March 11, 1999.

The appellant, Lereed Shelton, was convicted of third-degree assault in the district court. See §13A-6-22, Ala. Code 1975. He appealed his conviction to the

Etowah Circuit Court for a trial de novo; he was again convicted of third-degree assault. The circuit court sentenced him to 30 days' confinement, but suspended the sentence and placed him on unsupervised probation for two years. As a condition of his probation, Shelton was also ordered to pay a $500 fine, court costs, and $516.69 in restitution, as a condition of his probation. In this opinion, we address the trial court's order on return to remand and the issues raised by Shelton that we did not address in our first opinion. See Shelton v. State, [Ms. CR-97-1313, October 2, 1998] ___ So.2d ____, ____ (Ala.Cr.App. 1998).

I.

On October 2, 1998, we remanded this cause for the trial court to determine whether the appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. In its order on return to remand, the trial court made the following findings:

> "1. Although the Defendant never made a statement on the record specifically waiving his right to counsel, it is the opinion of this Judge that the Defendant fully understood his right to employ counsel and in fact did a creditable job of defending his own case both at the District and Circuit Court levels.
>
> "2. Repeatedly during the trial of his case, the Court informed the defendant about the problems of [his] representing himself and the fact that he was a lay-person would not allow him to circumvent the rules of evidence.
>
> "3. The defendant appeared to be an intelligent, articulate, shrewd businessman fully aware of

what was going on in the courtroom and aware of the criminal charge against him and the possibilities of punishment (he was found guilty in District Court and received a fine and [was] ordered to pay restitution)."

In our October 2 opinion, we held that Shelton has a constitutional right to counsel. See Shelton, ___ So.2d at ____. However, in so holding, we overlooked clear precedent to the contrary. Upon reconsideration, we find that Shelton did not have a Sixth Amendment right to counsel because he did not receive a sentence that resulted in actual confinement.

We apply the same rationale we applied in Benson v. City of Sheffield, [Ms. CR-98-0280, April 30, 1999] ____ So.2d ____, ____ (Ala.Cr.App. 1999):

"In Argersinger v. Hamlin, 407 U.S. 25, 37-40 (1972), the United States Supreme Court held:

" '[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial.

"....

" 'Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

" 'The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.' "

The Argersinger Court expressly reserved ruling on "the requirements of the Sixth Amendment as regards the right to counsel where [actual] loss of liberty is not involved." Id. at 37. In Scott v. Illinois, 440 U.S. 367, 373 (1979), the United States Supreme Court affirmed an indigent appellant's conviction for theft; the conviction was obtained without the benefit of counsel in a case where the only punishment imposed was a $50 fine, although imprisonment was authorized. The Court wrote:

"[T]he central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointed counsel."

In Salter v. State, 470 So.2d 1360, 1362 (Ala.Cr.App. 1985), this court held that "the constitutional right to counsel is limited to criminal offenses resulting in actual imprisonment." This court followed the guidelines set out in Argersinger and Scott and chose not to enlarge the rights of those persons convicted of misdemeanors who were not sentenced to actual imprisonment.

We cited this same caselaw in Jowers v. City of Selma, 688 So.2d 278 (Ala.Cr.App. 1996), in deciding a case with similar circumstances. In holding that the

appellant did not have a right to counsel in a misdemeanor case in which the sentence was suspended, we wrote:

> "[The defendant's] sentence of probation does not constitute actual imprisonment. Therefore, under Argersinger, Scott, and Salter, [the defendant's] Sixth Amendment rights were not violated. If in the future, the trial court revokes [the defendant's] probation and sentences him to jail, that revocation may constitute a violation of [the defendant's] Sixth Amendment right to appointed counsel. However, we will not reverse the trial court on the mere possibility that, at a remote and future date, [the defendant's] Sixth Amendment right may be violated."

688 So.2d at 279-80.

Our October 2, 1998, opinion, authored by Judge Montiel, cited Williams v. City of Phenix City, 659 So.2d 1004 (Ala.Cr.App. 1995), a case that preceded Jowers, as precedent for its holding that Shelton had a Sixth Amendment right to counsel. In Williams, this court held that a conditionally suspended sentence of imprisonment could not be imposed on an indigent defendant who had been denied counsel. However, in that case, the trial court conditioned the defendant's release on the payment of the imposed fines and costs, and the defendant's inability to pay resulted in actual imprisonment. While Shelton's suspension was also conditioned on the payment of fines and court costs, there is no indication in the record that he was ever actually confined because of an inability to pay.

The October 2, 1998, opinion also cited Culberson v. State, 709 So.2d 1327 (Ala.Cr.App.

1997). In Culberson, the defendant, acting pro se, pleaded guilty to two counts of reckless endangerment and one count of harassing communications; he was sentenced to 12 months' confinement for each count, the sentences to run concurrently. The sentences were suspended, and Culberson was placed on 24 months' supervised probation. On the issue whether the trial court erred in not advising Culberson of his right to counsel, this court acceded to the State's request and remanded the case to the trial court for a hearing to determine Culberson's indigence, to determine whether Culberson was properly advised of his right to counsel, and to determine whether he waived his right to counsel.[1] In doing so, this court relied only on Williams, and completely ignored its more recent application of Argersinger, Scott, and Salter in Jowers.

This court will not apply the holding in Williams in a situation where there is no evidence in the record that the appellant has actually been deprived of liberty because of the conditions of release from confinement. When the record reflects that the appellant received a suspended sentence of confinement for a misdemeanor conviction and was never subjected to actual imprisonment, this court's holding in Jowers is the correct interpretation of the law concerning a defendant's Sixth Amendment right to counsel. Unless an appellant has actually suffered a

---

[1] The case was also remanded for the trial court to vacate the sentence ordering 12 months' confinement and imposing $750 fine on the conviction for harassing communications, a Class C misdemeanor, and to resentence Culberson on that count because the sentence exceeded the limitations provided by statute (three months' confinement and a $500 fine).

deprivation of liberty, there is no Sixth Amendment right to counsel in a misdemeanor prosecution in which a sentence was suspended. We will not reverse the trial court "on the mere possibility that, at a remote and future date, [Shelton's] Sixth Amendment right may be violated" by a later attempt to revoke his probation and impose a sentence of confinement. Jowers, 688 So. 2d at 280.

It is certainly the "best practice" for all trial courts when disposing of misdemeanor cases to fully advise defendants of their rights and to obtain signed waivers of the right to counsel. Nevertheless, extending all the protections afforded defendants facing felony charges to those misdemeanor defendants who are not in danger of being incarcerated would be a huge leap from the current state of the law in Alabama. It is time for this court to reapply the holdings in Salter and Jowers. We herby [sic] overrule Williams and Culberson, to the extent that those opinions hold that a misdemeanor defendant is entitled to counsel if the defendant is sentenced to conditionally suspended confinement, regardless of whether the defendant is actually incarcerated.

Because Shelton never was actually imprisoned, he had no Sixth Amendment right to counsel, and there was no requirement for the trial court to inform him of such a right or to determine whether he intelligently waived such a right. The trial court did not err when it did not conduct an inquiry to determine Shelton's indigence and, had it found Shelton indigent, to advise him of the right to appointed counsel or to determine whether Shelton was affirmatively waiving such a right.

II.

Shelton contends that his lack of arraignment invalidates his conviction. Specifically, Shelton argues that Rule 14.1(c), Ala.R.Crim.P., governs the trial court and affirmatively requires arraignment in an appeal de novo to a circuit court. We agree, but because Shelton failed to object to his lack of arraignment, he waived arraignment by remaining silent. See Johnston v. City of Irondale, 671 So.2d 777, 779 (Ala.Cr.App. 1995) (defendant appealed to the circuit court for a trial de novo and waived arraignment by failing to object to his lack of arraignment); Singleton v. City of Tuscaloosa, 557 So.2d 565, 566 (Ala.Cr.App. 1990) (citing Watts v. State, 460 So.2d 204 (Ala. 1983)). Moreover, the purpose of arraignment is to ensure that the accused is familiar with the charges brought against him. See Singleton, 557 So.2d at 567. Because Shelton was tried in the district court for the same charge, he was familiar with the charge brought against him in the circuit court. In addition, Shelton testified that he remembered pleading not guilty in the district court to third-degree assault. (Supp. R. 42.)

III.

Shelton alleges that the State prosecuted him for third-degree assault in an effort to compel him to pay the victim, Kenny Campbell, for property damage

to Campbell's car.[2] At the close of a preliminary hearing, the trial judge asked the parties if they had any further matters to discuss before trial. The State responded:

"Nothing further, Judge, except that [Kenny Campbell] just wants his truck paid for and he is willing to accept payment for his truck and go on about his business. If Mr. Shelton might be willing to do that."

(R. 8-9.) The trial judge stated that he refused to get involved in settling a civil case and instructed the parties that he would hear only evidence concerning the alleged assault. (R. 9.) Shelton argues that the State's remarks indicated that the motivation for prosecuting Shelton was to collect a private debt.

Shelton failed to properly preserve this issue for review. Shelton should have objected when the State made these remarks or filed a motion to dismiss, asserting this ground. See King v. State, 401 So.2d 226, 232 (Ala.Cr.App. 1981); Harris v. State, 378

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[2] The record indicates that prior to the physical confrontation between Shelton and Campbell, Shelton and Campbell were involved in an automobile collision, which resulted in damage to Campbell's car. (R. 17-21.) Campbell allegedly unsuccessfully attempted to obtain reimbursement from Shelton for the damage. (R. 22-24.) The State presented evidence showing that Campbell went to a store where Shelton worked to gain information about Shelton's insurance company. Shelton's son began "slugging" Campbell. While Shelton's son and another man held Campbell, Shelton repeatedly hit Campbell in the ribs and the face. (R. 25-27.)

So.2d 257, 262 (Ala.Cr.App. 1979). Even if Shelton had properly preserved this issue, his argument is without merit. This prosecution did not arise because Shelton allegedly owed Campbell money; it arose because Shelton punched Campbell with his fists, in violation of §13A-6-22, Ala. Code 1975. See Holland v. State, 440 So.2d 1236 (Ala.Cr.App. 1983).

IV.

After the jury began its deliberations, a juror sent a note to the trial judge asking, "Was the fact that Mr. Shelton did not take any action to resolve this problem -- could that be abetting the action in the altercation?" (C. 80.) Upon receipt of the note, the trial judge stated that he would recharge the jury on the concepts of aiding and abetting in an effort to solve the confusion. (R. 158.) Both the State and Shelton agreed to the supplemental charge. (R. 159.) After the trial judge recharged the jury, Shelton informed the trial judge that he was satisfied with the supplemental charge. (R. 162.)

On appeal, Shelton contends that the trial judge did not adequately respond to the juror's inquiry. Shelton has waived this issue because he failed to object to the trial judge's supplemental instruction. See Murphy v. State, 641 So.2d 1256, 1260 (Ala.Cr.App. 1993). Moreover, at trial, Shelton stated that he was satisfied with the instruction.

V.

During a preliminary hearing, the State made a motion in limine, requesting that Shelton be prohibited from referring to, during his opening statements, a prior conviction of Kenny Campbell, the victim, for possession of a [sic] marijuana. (R. 3.) The trial judge granted the State's motion, holding that Shelton could not refer to the evidence in his opening

statement but that he could try to admit the evidence to impeach Campbell when Campbell testified. (R. 5-6.) Shelton argues that the trial judge's ruling denied him his right to include a statement of what he expected the evidence to show in his opening statement.

A trial judge's decision to grant or deny a motion in limine is within the judge's sound discretion. See Zasadil v. City of Montgomery, 594 So.2d 231, 232 (Ala.Cr.App. 1991); Primm v. State, 473 So.2d 1149, 1158 (Ala.Cr.App. 1985). Moreover, the scope of an opening statement rests "within the sound discretion of the trial judge." Hunt v. State, 659 So.2d 933, 941 (Ala.Cr.App. 1994). The trial judge did not abuse his discretion by preventing Shelton from referring to the convictions in his opening statement because Shelton's argument is without merit. The purpose of an opening statement is for " 'each party to give the jury an overview of what the evidence will show.' " Frazier v. State, [Ms. CR-95-2222, January 15, 1999] ___ So.2d ____, ____ (Ala.Cr.App. 1999) (quoting McKinney v. State, 654 So.2d 95, 98 (Ala.Cr.App. 1995)).

In his brief, Shelton contends that he should have been able to refer to the prior conviction because the main issue was the credibility of Campbell, the victim. He cites Rule 609(a)(1), Ala.R.Evid., as authority. Shelton, however, has misconstrued Rule 609. Rule 609 does provide for a method of attacking the credibility of a witness with prior convictions. See Baxter v. State, 723 So.2d 810, 819 (Ala.Cr.App. 1998); Rule 404(a)(3), Ala.R.Evid. (listing Rule 609 as a valid form of impeachment). The credibility of a witness, however, is not at issue until the witness actually takes the stand to testify. See Rule 404(a)(3), Ala.R.Evid., Advisory Committee's Notes (citing C. Gamble, Character Evidence: A Comprehensive

Approach 56 (1987)); C. Gamble, McElroy's Alabama Evidence, §140.01(1)(a) (5th ed. 1996). Thus, the trial judge correctly granted the State's motion in limine, prohibiting Shelton from referring to the prior conviction until Campbell testified.

VI.

Shelton contends that the trial court erred when it failed to grant his motion for a mistrial, which he made during the testimony of Officer Debbie Barnett. Shelton called Officer Barnett as a witness in an effort to elicit testimony concerning a prior complaint Shelton filed against Campbell. (R. 86.) The record indicates that the officer was unsure of the subject matter of her testimony. In fact, her testimony showed that she thought she was being called to testify for another case. During Shelton's direct examination of Officer Barnett, the following occurred:

"[SHELTON]: Ms. Barnett, I'm Lereed Shelton from Mountaintop -- did they ever approach you about swearing a warrant out or getting charges brought against Mr. Kenny Campbell?

"[OFFICER BARNETT]: This [case concerns] Mr. Campbell?

"[SHELTON]: Yes.

"[OFFICER BARNETT]: I'm sorry, Mr. Shelton. I thought this [case] was [about] the assault charge that Michael Sanders made against you back in -- when I took the picture back in 1994, which is not on this case. I'm sorry.

"[DEPUTY DISTRICT ATTORNEY]: May we approach the bench?

"THE COURT: All right.

"UNIDENTIFIED WITNESS: That is on a sexual abuse case, a case with my daughter.

"[OFFICER BARNETT]: No, not on this one, that's another one.

"[SHELTON]: I object.

"[OFFICER BARNETT]: That's not the same one. That's another one.

"THE COURT: Wait a minute. Time out.

"[SHELTON]: I would like a mistrial."

(R. 84-85.) A sidebar discussion followed, and Shelton told the trial judge his purpose for calling Officer Barnett to testify. Shelton seems to have based his motion for a mistrial on the ground that Officer Barnett's answer was nonresponsive. (R. 86.) The trial judge sustained Shelton's objection, striking the response from the record, but the trial judge did not rule on Shelton's motion for a mistrial.

Absent a timely objection and an adverse ruling, nothing is preserved for appellate review. See Pace v. State, 714 So.2d 332, 334 (Ala. 1997) (citing Biddie v. State, 516 So.2d 846 (Ala. 1997)). The portion of the record reproduced above indicates that Shelton failed to obtain an adverse ruling on his motion. It is the appellant's duty to preserve an issue by obtaining an adverse ruling on the record. See Berryhill v. State, 726 So.2d 297, 302 (Ala.Cr.App. 1998). Shelton made no effort to elicit an adverse ruling; thus, this issue is procedurally barred from our review. Moreover, Shelton neither requested nor objected to the trial

judge's failure to give a curative instruction. See Goodwin v. State, [Ms. CR-96-0574, August 14, 1998] ___ So.2d ___, ___ (Ala.Cr.App. 1998); Davis v. State, [Ms. CR-96-2341, May 29, 1998] ___ So.2d ___, ___ (Ala.Cr.App. 1998).

VII.

Shelton argues that the trial judge misinformed him, during his sentencing hearing, about the period that Shelton had for filing post-trial motions. He claims that this misinformation violated his due process rights. After the trial judge sentenced Shelton, the trial judge instructed him as follows:

> "You have the right to appeal the case, if you want to, to the Court of Criminal Appeals, and if you want to do that, you have got to do it within 42 days, counting today. If you cannot afford an attorney or a transcript and you can show that you are indigent, then we would appoint you an attorney and furnish you with a free transcript. You are free to file any post trial motions and appeal, but you must do so within 42 days. Do you understand that?"

(R. 168.) In his brief, Shelton claims that he understood the trial judge to be instructing him that he had 42 days to file a post-trial motion, instead of 30 days, which is the correct number of days. See Rule 24, Ala.R.Crim.P. This issue is moot because the record does not show that Shelton attempted to file any post-trial motions after 30 days.

VIII.

Shelton contends that the trial judge improperly ordered him to pay restitution. Specifically, Shelton argues that a trial judge must hold a restitution

hearing, which did not occur in this case, before the judge can order the accused to pay restitution. Shelton correctly cites §15-18-67, Ala. Code 1975, in support of his argument. He failed, however, to properly preserve the issue for appellate review. Shelton should have objected at trial to the trial judge's failure to conduct a restitution hearing. See Perkins v. State, 715 So.2d 888, 892 (Ala.Cr.App. 1997); Dollar v. State, 687 So.2d 207, 208 (Ala.Cr.App.), rev'd on other grounds, 687 So.2d 209 (Ala. 1996).

IX.

Shelton argues that the trial court committed reversible [sic] when it failed to give Shelton the opportunity to make a statement in his own behalf prior to imposing the sentence. Rule 26.9(b)(1), Ala.R.Crim.P., mandates that a trial court give a defendant an opportunity to make a statement in his behalf before the imposition of his sentence. See, also, Davis v. State, [Ms. CR-97-2301, March 26, 1999] ___ So.2d ____, ____ (Ala.Cr.App. 1999). All defendants are "entitled to an allocution, regardless of the gravity of the sentence imposed." Id. (citing Rule 26.9, Ala.R.Crim.P., Committee Comments). Moreover, the failure to afford a defendant an allocution renders his sentence erroneous. See Lancaster v. State, 638 So.2d 1370, 1373 (Ala.Cr.App. 1993).

The judgment order contained in the record indicates that Shelton was afforded an allocution, but the transcript of the sentencing hearing does not show that Shelton was afforded that opportunity before the trial judge imposed sentence. (C. 16; R. 164-67.) In reading the transcript of the sentencing hearing, we note that Shelton did make comments and express concerns to the trial court. Before the imposition of sentence, the trial judge asked Shelton and the district

attorney about the sentence that Eddie Shelton, Shelton's son, had received for the same assault. The following occurred,

> "[SHELTON]: That case don't have anything to do with this one, your Honor. Why should –
>
> "THE COURT: Well, I know. I'm just trying to set the sentence now. The jury -- $516.69 is what is in the evidence.
>
> "[STATE]: That is what we would submit then.
>
> "THE COURT: Okay. Thirty days suspended, $516.69 restitution, $500 fine, which is what [the trial judge in Eddie Shelton's case] did.
>
> "[SHELTON]: That is not what the other sentence was.
>
> "THE COURT: Well, this is a whole new day. You got a new day in court. I can set the sentence. I can give you a year ... and not suspend the sentence.
>
> "[SHELTON]: Okay.
>
> "THE COURT: But I'm not going to do that. Thirty days suspended, $500 fine, $516.69 restitution.
>
> "[STATE]: Two years' unsupervised probation?
>
> "THE COURT: Yes, unsupervised probation. Anything further?"

(R. 166-67.) Although the transcript indicates that the trial judge allowed Shelton to make statements during his sentencing, the trial judge failed to make it clear that Shelton had a right to make a statement in his behalf to the court. This opportunity is absolutely required. See Rule 26.9(b)(1), Ala.R.Crim.P., Committee Comments; Burks v. State, 600 So.2d 374, 382 (Ala.Cr.App. 1991). Even though the trial judge was not required to invoke any "magic" words, the transcript does not make it clear that Shelton understood that he had a right to make a statement as to why his sentence should not have been imposed. See Jones v. State, 555 So.2d 333, 336 (Ala.Cr.App. 1989) (stating that even though the trial judge did not use any magic words, the record reflects that the defendant was, in fact, given the opportunity to make a statement). Because the transcript does not clearly indicate that Shelton was aware of this right, a discrepancy exists between the transcript and the judgment order; therefore, this case must be remanded to the trial court to determine if Shelton was afforded allocution. See Davis, supra; Burks, 600 So.2d at 383. If the trial court determines that Shelton was not given the opportunity to make a statement in his behalf before the imposition of his sentence, the trial court must conduct a new sentencing hearing and allow for a proper allocution. The trial court shall take all necessary action to allow return to remand to be filed with this court within 42 days of the date of this opinion.

X.

Shelton contends that his trial was unfair because of the cumulative effect of the trial judge's rulings, the prosecutor's conduct, and the conduct of the prosecution's only witness, Campbell. Specifically, Shelton argues that he should be granted a new trial

because (1) he was not represented by counsel, (2) he was never arraigned, (3) he was not fully informed of the charges against him or his possible range of punishment, (4) the district attorney's complaint against him was insufficient, (5) the trial judge improperly restricted the scope of his opening statement, (6) the trial judge's preliminary instructions to the jury did not properly characterize the charge against him, (7) Campbell's self-serving statements during his testimony prejudiced Shelton, (8) the prosecutor improperly asked Campbell leading questions during direct examination, (9) the trial judge failed to instruct the jury to disregard the unresponsive statement made by Officer Barnett, (10) the trial judge did not properly respond to the jury's inquiry during deliberations, (11) he was not afforded allocution, and (12) the trial judge incorrectly informed him that he had 42 days in which to file any post-trial motions.

We have addressed Shelton's issues 1, 2, 5, 9, 10, 11, and 12 in this opinion. In addition, we addressed Shelton's fourth issue in our first opinion dealing with this case. See Shelton v. State, [Ms. CR-97-1313, October 2, 1998] ___ So.2d ____, ____ (Ala.Cr.App. 1998).

Shelton contends that he was not fully informed of the charge against him or of the possible range of punishment. Shelton has failed to preserve either issue for review. See Biddie, 516 So.2d at 847. In addition, Shelton was not entitled to be informed of the maximum and minimum possible punishment, because he did not enter a guilty plea. Moreover, Shelton tried his case in the district court before appealing for a trial de novo in the circuit court; thus, he was well aware of the charge against him.

Shelton did not properly preserve his argument that the trial judge's preliminary instructions to the

jury improperly characterized the charge against him. No objection appears on the record. See Rule 21.3, Ala.R.Crim.P.; Phillips v. State, 726 So.2d 292, 293 (Ala.Cr.App. 1998). Moreover, Shelton's claim is without merit. A review of the instructions indicates that the trial judge did nothing more than explain the elements of assault in the third degree, as defined in §13A-6-22, Ala. Code 1975, and recite the charge as alleged in the complaint. (R. 12-14.) These instructions did not mischaracterize third-degree assault.

Shelton argues that his trial was prejudiced by what he says was Campbell's self-serving testimony during direct and cross-examination. Shelton failed to preserve this issue for review because he failed to object on this basis at any point during Campbell's testimony. See Biddie, 516 So.2d at 847. Shelton also contends that the prosecutor improperly asked Campbell leading questions during direct examination, but he failed to preserve the issue by objecting to the manner of questioning on this ground. See id.

For the above-mentioned reasons, Shelton's conviction of assault in the third-degree is due to be affirmed and the case remanded to ensure that Shelton was afforded allocution.

AFFIRMED AS TO CONVICTION AND REMANDED.

McMillan and Fry, JJ., concur. Baschab, J., dissents with opinion in which Long, P.J., joins.

BASCHAB, J., DISSENTING.

I disagree with the majority opinion, which holds that there is no right to counsel in a

misdemeanor case when a trial court imposes a sentence of imprisonment and then suspends that sentence or places the defendant on probation. The majority states that "extending all the protections afforded defendants facing felony charges to those misdemeanor defendants who are not in danger of being incarcerated would be a huge leap from the current state of the law in Alabama." However, a defendant whose sentence has been suspended or probated is in danger of being incarcerated because the court retains the authority to revoke a suspended or probated sentence and to reinstate the remaining term of imprisonment. Therefore, I maintain the position I advanced in my dissent in Benson v. City of Sheffield, [Ms. CR-98-0280, April 30, 1999] ___ So.2d ____ (Ala. Cr. App. 1999), that a defendant facing a suspended or probated sentence is entitled to counsel. Because I believe that the appellant had a right to counsel and because the record does not reflect that the trial court advised the appellant of his right to withdraw his waiver of counsel, I believe this case should be remanded for a new trial. See Farid v. State, 720 So.2d 998, 999 (Ala. Cr. App. 1998). Therefore, I must respectfully dissent.

COURT OF CRIMINAL APPEALS
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MONTGOMERY, AL 36130-1555

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Hon. Billy Yates, Circuit Clerk

Hon. William H. Mills, Attorney

Lereed Shelton, Pro Se

RE: CR-97-1313
Lereed Shelton v. State of Alabama (Appeal from Etowah Circuit Court: CC97-365).

Dear Sir or Madam:

You are hereby notified that on September 24th, 1999 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled. 39(k) Motion Denied.

Lane W. Mann
Clerk
Court of Criminal Appeals

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1990031

Released May 19, 2000

Ex parte Lereed Shelton

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Lereed Shelton
v.
State)

(Etowah Circuit Court, CC-97-365;
Court of Criminal Appeals, CR-97-1313)

JOHNSTONE, Justice.

In district court Lereed Shelton was convicted of assault in the third degree, a violation of §13A-6-22, Ala. Code 1975. The district court ordered him to pay a $500 fine and $333.75 as restitution to the victim. Shelton appealed for a trial de novo in circuit court. Pursuant to a jury trial during which Shelton represented himself, Shelton was convicted of assault in the third degree. The sentence of the trial court imposed 30 days' imprisonment, a $500 fine, restitution of $516.69 payable to the victim, and court costs. The trial court, however, suspended the 30 days' imprisonment, placed Shelton on probation, and imposed certain conditions, including timely payment of the sums ordered.

Shelton appealed to the Court of Criminal Appeals, which, holding that he did have a constitutional right to counsel because he had received a sentence to suspended imprisonment, remanded his case for the trial court to determine whether Shelton made a knowing, intelligent, and voluntary waiver of his right to counsel. Shelton v. State, [Ms. CR-97-1313, October 2, 1998] ___ So. 2d ____ (Ala. Crim. App. 1998). On remand, the trial court conducted a hearing at which Shelton was represented by counsel. Shelton testified that he was not informed that he had a right to counsel and that he was not asked whether he wanted to be represented by counsel. He also testified that he was not informed that he could possibly serve time in jail for his conviction. On cross-examination, Shelton stated that he was aware he could be represented by counsel if he "went and paid the money" to hire a lawyer. He stated further that he believed that the trial court would consolidate his case with his son's case and that they would share the same lawyer. The record does not contain evidence that anyone told Shelton that the trial court would appoint a lawyer to represent him if

he could not afford one. The prosecutor argued that, although the record did not reflect that anyone informed Shelton of his right to counsel and that he waived his right, Shelton was aware of his right to counsel because he was present when his son, who was Shelton's codefendant, was informed of his right to counsel and because the trial court warned Shelton throughout the proceedings that he needed a lawyer. The prosecutor stated further that Shelton did a "very good job of representing himself."

Thereafter, trial court entered the following order:

> "1. Although [Shelton] never made a statement on the record specifically waiving his right to counsel, it is the opinion of this Judge that [Shelton] fully understood his right to employ counsel and in fact did a creditable job of defending his own case both at the District and Circuit Court levels.
>
> "2. Repeatedly during the trial of his case, the Court informed [Shelton] about the problems of him representing himself and the fact that he was a lay person would not allow him to circumvent the rules of evidence.
>
> "3. [Shelton] appeared to be an intelligent, articulate, shrewd businessman fully aware of what was going on in the courtroom and aware of the criminal charge against him and the possibilities of punishment (he was found guilty in District Court and received a fine and ordered to pay restitution)."

The trial court does not state in this order that it actually informed Shelton of his right to counsel. The

trial court does not state that it informed Shelton that the court would appoint a lawyer to represent him if he could not afford to hire a lawyer.

On return to remand, the Court of Criminal Appeals, citing the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972), and Scott v. Illinois, 440 U.S. 367 (1979), held that Shelton did not have a constitutional right to counsel because his sentence was suspended and he was not actually imprisoned.[3] After the Court of Criminal Appeals overruled Shelton's application for rehearing and denied his Rule 39(k), Ala. R. App. P., motion, he petitioned this Court for a writ of certiorari. We granted Shelton's petition to determine the following: 1) whether Shelton had a constitutional right to counsel even though he was never actually imprisoned; 2) whether Shelton knowingly, intelligently, and voluntarily waived his right to counsel; and 3) whether the trial court denied Shelton his right to a restitution hearing in violation of §15-18-67, Ala. Code 1975.

In concluding, in this second opinion, that Shelton did not have a constitutional right to counsel, the Court of Criminal Appeals relied on the following holding of the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. at 37-40:

> "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or

---

[3] The Court of Criminal Appeals affirmed Shelton's conviction, but remanded for the trial court to conduct a new sentencing hearing and to allow Shelton the right to allocution.

> felony, unless he was represented by counsel at his trial.
>
> "....
>
> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.
>
> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the [sic] 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."

This Argersinger holding necessarily requires a court reviewing a claim of violation of a defendant's right to counsel to determine the existence of the right retroactively on the basis of the sentence imposed on the unrepresented defendant.

The defendant in Argersinger was convicted, without the aid of counsel, of the misdemeanor offense of carrying a concealed weapon. He was sentenced to 90 days in jail. The Court held that, because the defendant had been imprisoned and had suffered an actual loss of liberty, he was entitled to representation by counsel. The Court did not address the issue of a defendant's right to counsel when no loss of liberty has occurred. Argersinger, 407 U.S. at 37.

In another case, Scott v. Illinois, supra, the United States Supreme Court considered the right to counsel of an indigent defendant who was convicted of shoplifting, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of one year, or by both. The defendant was fined $50, but was not sentenced to any term of imprisonment. In that case, the Court concluded that the defendant was not entitled to appointed counsel:

> "[W]e believe that the central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."

440 U.S. at 373. (Emphasis added.)[4]

Neither Argersinger nor Scott addresses the issue currently before us -- whether a suspended or probated sentence to imprisonment constitutes a "term of imprisonment." However, some federal and state courts have interpreted Argersinger and Scott to mean that a defendant who is convicted, without the aid of counsel, of a misdemeanor offense and is sentenced to a term of imprisonment which is suspended or probated, does not have a right to appointed counsel because the defendant was not "actually imprisoned." See People v. Reichenbach, 459 Mich. 109, 587 N.W.2d 1 (1998); Layton City v. Longcrier, 943 P.2d 655 (Utah App. 1997); Griswold v. Commonwealth, 252 Va. 113, 472 S.E.2d 789 (1996); State v. Hansen, 273 Mont. 321, 903 P.2d 194 (1995); United States v. Smith, 56 F.3d 66 (6th Cir. 1995); United States v. Castro-Vega, 945 F.2d 496 (2d Cir. 1991); United States v. Nash, 703 F. Supp. 507 (W.D. La.), aff'd, 886 F.2d 1312 (5th Cir. 1989); State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (N.M. App.

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[4] The United States Supreme Court expounded further on the requirement that a defendant must be "sentenced to a term of imprisonment" in Nichols v. United States, 511 U.S. 738, 749 (1994), which held that "an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nicholas overruled Baldasar v. Illinois, 446 U.S. 222 (1980), which held that a prior uncounseled misdemeanor conviction, constitutional under Scott, could not be used to enhance a second misdemeanor conviction to a felony conviction.

1980); and Cottle v. Wainwright, 477 F.2d 269 (5th Cir.), vacated on other grounds, 414 U.S. 895 (1973).

On the other hand, other courts have held that an indigent defendant who receives a conditionally suspended or probated sentence to imprisonment is entitled to representation by appointed counsel because that defendant has been "sentenced to a term of imprisonment." United States v. Reilley, 948 F.2d 648 (10th Cir. 1991); United States v. Foster, 904 F.2d 20 (9th Cir. 1990); United States v. Sultani, 704 F.2d 132 (4th Cir. 1983); United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979); and United States v. White, 529 F.2d 1390 (8th Cir. 1976). For example, in Reilley, the defendant was charged with leaving property unattended in a national park for longer than 24 hours in an undesignated area, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of six months or by both. The defendant established his indigence and requested appointed counsel, but the trial court denied his request. He was convicted and was sentenced to 30 days' imprisonment, suspended on the condition that he timely pay his $500 fine. In vacating the defendant's 30-day prison sentence, the Reilley court reasoned:

> "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid. Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity."

Applying the rationale of Reilley, Argersinger, and Scott, we hold that the defendant in this case was entitled to representation by counsel because he was

sentenced to a term of imprisonment, albeit suspended. We do not conclude that a defendant convicted of a petty or misdemeanor offense can establish a violation of his right to counsel when the defendant has not been sentenced to a term of imprisonment. For these reasons, we reverse the holding of the Court of Criminal Appeals that a defendant sentenced to conditionally suspended incarceration for a misdemeanor conviction but not actually incarcerated, does not (retroactively) have a right to counsel. Furthermore, we hold that the Court of Criminal Appeals improperly overruled Williams v. City of Phenix City, 659 So. 2d 1004 (Ala. Crim. App. 1995), and Culberson v. State, 709 So. 2d 1327 (Ala. Crim. App. 1997), which hold that a conditionally suspended or probated sentence of incarceration cannot be imposed on an indigent defendant who has been denied his right to counsel.[5]

Our inquiry does not end with the determination that Shelton had a right to counsel. We must determine whether the defendant effectively waived his right to counsel in this case. A defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, unless the defendant either had counsel or made a knowing, intelligent, and voluntary waiver of his right to counsel. Argersinger, 407 U.S. at 37. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected

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[5] We note further that the holding of the Court of Criminal Appeals in Benson v. City of Sheffield, 737 So. 2d 1059 (Ala. Crim. App. 1999), is improper for the same reasons stated in this opinion.

the offer." Carnley v. Cochran, 369 U.S. 506, 516 (1962). See Lake v. City of Birmingham, 390 So. 2d 36 (Ala. Crim. App. 1980). To establish a knowing and intelligent waiver of counsel, "the record at the outset of the trial should establish three factors: 1) that the defendant was informed that he had the right to counsel, 2) that the defendant was informed that if he could not afford counsel the state would appoint counsel to represent him, and 3) an affirmative showing by the defendant that, understanding these rights, he still elects to proceed without counsel." Jenkins v. State, 482 So. 2d 1315, 1317 (Ala. Crim. App. 1985).

The record fails to establish that Shelton "was offered counsel" as required by Carnley, supra. Likewise the record fails to establish any of the three factors required by Jenkins, supra. The trial judge's admonitions to Shelton to the effect that he needed a lawyer are a far cry from explanations of the right to counsel or offers of appointed counsel if Shelton could not afford to retain counsel. Therefore, we cannot say that Shelton intelligently and understandingly waived his right to counsel.

Shelton claims also that he was denied his right to a restitution hearing pursuant to §15-18-67, Ala. Code 1975. The Court of Criminal Appeals held that Shelton did not preserve this issue for appellate review because he did not object at the original sentencing hearing to the trial court's failure to conduct a restitution hearing. Perkins v. State, 715 So. 2d 888, 892 (Ala. Crim. App. 1997); Dollar v. State, 687 So. 2d 207, 208 (Ala. Crim. App.), rev'd on other grounds, 687 So. 2d 209 (Ala. 1996). We agree. During neither the original sentencing proceedings nor the first remand proceedings did Shelton request a restitution hearing or object to the trial court's failure to conduct a restitution hearing. He did not make any argument

that the restitution was not supported by the evidence. Cf. Ex parte Clare, 456 So. 2d 357, 359 (Ala. 1984) (holding that defendant's argument regarding the amount of restitution ordered was preserved for appellate review even though defendant did not object during the restitution hearing because defense counsel "made known to the [trial] court his disagreement with the State concerning the amount of restitution"). Shelton did not present this issue concerning a restitution hearing to the trial court until the commencement of the second remand proceedings. Because Shelton did not timely raise this issue before the trial court for its consideration, this issue has not been properly preserved for our review. Moreover, during the trial, the State presented medical bills showing that the victim owed $516.69 for treatment for injuries he suffered as a result of the assault by Shelton. Shelton had ample opportunity to present evidence to dispute the restitution amount.

Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel, and having found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right, we affirm Shelton's conviction but reverse that aspect of his sentence imposing 30 days of suspended jail time. The remaining aspects of the sentence are affirmed. We remand this cause to the Court of Criminal Appeals for that court to remand with instructions to the trial court to vacate that aspect of Shelton's sentence imposing the suspended jail time.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hooper, C.J., and Houston, Cook, Lyons, and England, JJ., concur.

Maddox, J., dissents.

Brown, J., recuses herself.*

* Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.

MADDOX, Justice (dissenting).

I see no need to reach the question whether Shelton was entitled to counsel in this case because I believe that, even if he had that right, he waived it, as the trial court determined on remand from the Court of Criminal Appeals.

I recognize that, as the main opinion states, "[a] defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, unless the defendant either had counsel or made a knowing, intelligent, and voluntary waiver of his right to counsel ." ___ So. 2d at ____. I also agree that we may not presume waiver of this important right from a silent record, see Carnley v. Cochran, 369 U.S. 506, 516 (1962), but I respectfully disagree with the proposition that the record in this case is silent as to the question of waiver.

The record shows that the Court of Criminal Appeals had remanded this case for the trial court to determine whether Shelton had intelligently and knowingly waived his right to counsel. At the trial court's hearing on that question, the State argued that during his prosecution Shelton was repeatedly told of his right to counsel and nevertheless chose to

represent himself. Based on that argument, the trial court entered an order finding that Shelton had waived his right to counsel.

Under the facts of this case, I am reluctant to question the judgment of the trial court. Furthermore, because the defendant received only a suspended sentence and was not incarcerated, I do not believe that he, in fact, had a right to counsel. Consequently, I respectfully dissent.

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1990031

Released October 27, 2000

Ex parte Lereed Shelton

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Lereed Shelton v. State)

(Etowah Circuit Court, CC-97-365; Court of Criminal Appeals, CR-97-1313)

On Application for Rehearing

JOHNSTONE, Justice.

APPLICATION OVERRULED; OPINION MODIFIED [BY SUBSTITUTION OF PAGES 6 AND 7].

Hooper, C.J., and Houston, Cook, Lyons, and England, JJ., concur.

Maddox, J., dissents.

Brown, J., recuses herself.*

***Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.**

from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 373. (Emphasis

added.)[6]

Neither Argersinger nor Scott addresses the issue currently before us -- whether a suspended or probated sentence to imprisonment constitutes a "term of imprisonment." However, some federal and state courts have interpreted Argersinger and Scott to mean that a defendant who is convicted, without the

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[6] The United States Supreme Court expounded further on the requirement that a defendant must be "sentenced to a term of imprisonment" in Nichols v. United States, 511 U.S. 738, 749 (1994), which held that "an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nicholas overruled Baldasar v. Illinois, 446 U.S. 222 (1980), which held that a prior uncounseled misdemeanor conviction, constitutional under Scott, could not be used to enhance a second misdemeanor conviction to a felony conviction.

Applying Argersinger and Scott in Ex parte Reese, 620 So. 2d 579, 580 (Ala. 1993), this Court recognized that a defendant has a right to counsel in a misdemeanor case in which the defendant receives a jail sentence. This Court held that, because the defendant was sentenced to six months in jail for a prior misdemeanor possession conviction, he was entitled to counsel in that case; and, therefore, without a showing that the defendant either had counsel or waived his right to counsel, that prior conviction could not be used to enhance his current conviction. 620 So. 2d at 581. Reese did not address the specific issue of whether a defendant who receives a suspended or probated sentence, but is not actually imprisoned, for a misdemeanor conviction is entitled to counsel.

aid of counsel, of a misdemeanor offense and is sentenced to a term of imprisonment which is suspended or probated, does not have a right to appointed counsel because the defendant was not "actually imprisoned." See People v. Reichenbach, 459 Mich. 109, 587 N.W.2d 1 (1998); Layton City v. Longcrier, 943 P.2d 655 (Utah App. 1997); Griswold v. Commonwealth, 252 Va. 113, 472 S.E.2d 789 (1996); State v. Hansen, 273 Mont. 321, 903 P.2d 194 (1995); United States v. Smith, 56 F.3d 66 (6th Cir. 1995); United States v. Castro-Vega, 945 F.2d 496 (2d Cir. 1991); United States v. Nash, 703 F. Supp. 507 (W.D. La.), aff'd, 886 F.2d 1312 (5th Cir. 1989); State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (N.M. App. 1980); and Cottle v. Wainwright, 477 F.2d 269 (5th Cir.), vacated on other grounds, 414 U.S. 895 (1973).

On the other hand, other courts have held that an indigent defendant who receives a conditionally suspended or probated sentence to imprisonment is entitled to representation by appointed counsel because that defendant has been "sentenced to a term of imprisonment." United States v. Reilley, 948 F.2d 648 (10th Cir. 1991); United States v. Foster, 904 F.2d 20 (9th Cir. 1990); United States v. Sultani, 704 F.2d 132 (4th Cir. 1983); United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979); and United States v. White, 529 F.2d 1390 (8th Cir. 1976). For example, in Reilley, the defendant was charged with leaving property unattended in a national park for longer than 24 hours in an undesignated area, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of six months or by both. The defendant established his indigence and requested appointed counsel, but the trial court denied his request. He was convicted and was sentenced to 30 days' imprisonment, suspended on the condition that he timely pay his $500 fine. In vacating the

defendant's 30-day prison sentence, the Reilley court reasoned:

> "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid. Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity."

Supreme Court, U.S.
FILED
APR 4 2001
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No. 00-1214

In The

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

vs.

LEREED SHELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The statement of the "Question Presented" in the Petition is premised on a flawed analysis of *Argersinger vs. Hamlin*, 407 U.S. 25 (1972) and *Scott vs. Illinois*, 440 U.S. 367 (1979). It attempts to derive a standard from those decisions (expressed as "actual imprisonment") which does not encompass their full meaning. Both decisions make it clear that it is "deprivation of a person's liberty" that invokes the constitutional right to counsel at trial. See 407 U.S. at 37-38, 40; 440 U.S. at 370, 373. Actual imprisonment is only one form of deprivation of liberty. Further, *Scott* makes it clear that the right to counsel applies every time a defendant is "sentenced to a term of imprisonment". 440 U.S. at 373-74. The clear language of *Argersinger* and *Scott* makes no exception for sentences of imprisonment which are suspended on the condition of probation. With all of the restrictions and restraints, including delayed incarceration, that probation entails, probation is inherently a deprivation of liberty.

The sentencing order in this case shows the Respondent was actually sentenced to a term of imprisonment. Consequently, the question presented by this case is not as ingenuous as the statement of the "Question Presented" in the Petition. Rather, this case embraces the broader questions of whether a jail sentence imposed and suspended on the condition of probation is a sentence imposed within the meaning of *Scott vs. Illinois* and whether a sentence imposed and suspended on the condition of probation (and the onerous limits on conduct,

QUESTION PRESENTED – Continued

behavior, and procedural rights that are an incident of probation under Alabama law) is a restraint on liberty within the meaning of *Argersinger vs. Hamlin* and *Scott vs. Illinois*.

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STATEMENT OF THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

Each of the following are reproduced in the Appendix to this brief:

Alabama Constitution § 6

Alabama Code § 15-22-50 (1975)

Alabama Code § 15-22-52 (1975)

Alabama Code § 15-22-54(d)(1),(2) (1975)

Alabama Rules of Criminal Procedure 6.1

Alabama Rules of Criminal Procedure 27.2

Alabama Rules of Criminal Procedure 27.6(d)(1)

STATEMENT OF THE CASE

The Respondent disagrees with the thrust and depth of the Statement of the Case in the Petition. While the Petition accurately summarizes the proceedings leading up to the Respondent's conviction, it fails to fully describe the actual sentence and, for reasons more fully discussed below, the significance of that sentence and its ramifications and consequences under Alabama law.

The full sense of the sentence imposed upon the Respondent can best be appreciated by reading the amended sentencing order of the trial court, which states in its essential part:

> Ordered by the Court that Defendant *be confined* in the Etowah County Detention Center for a period of thirty (30) days, sentence suspended

> and Defendant placed on two (2) years unsupervised probation. *As a condition of probation*, Defendant is ordered to pay court costs, a $500.00 fine, $25.00 as a Crime Victim's Assessment, and $516.69 restitution for the benefit of the victim, Kenny E. Campbell, all amounts ordered payment to the Clerk *immediately*. (Emphasis added)

(Record on Return to Remand, p.23.)

Under Alabama law, which defines the true nature and significance of this sentence, the sentencing of a defendant to imprisonment and suspension of the sentence on the condition of probation imposes a number of restraints on liberty. Most importantly, the sentence remains in force and effect in spite of the suspension and probation. See *Wray vs. State*, 472 So.2d 1119, 1121 (Ala. 1985); *Hamilton vs. State*, 43 Ala. App. 192, 186 So.2d 108, 114 (1965). A statute authorizes nine conditions of probation a sentencing court may impose, and allows a court to impose others at its discretion. See ALA. CODE § 15-22-52 (1975). Alabama law provides that the conditions of probation may be modified by a sentencing court without a hearing. See *A.R.Crim.P.* 27.2. Probation, of course, may be revoked and the sentence reinstated. See ALA. CODE § 15-22-54(d)(1) (1975). Under Alabama law probation may be revoked, and a probationer imprisoned, in a proceeding where the grounds for revocation need not be proven by legal evidence or beyond a reasonable doubt or even by a preponderance of evidence. See *A.R.Crim.P.*, 27.6 (d)(1); *Taylor vs. State*, 706 So.2d 1301, 1302 (Ala.Crim.App. 1997); *Powell vs. State*, 485 So.2d 379, 381 (Ala. 1986). In a probation revocation proceeding a probationer is not automatically entitled under Alabama law to counsel. See *Coon vs. State*, 675 So.2d 94, 95 (Ala.Crim.App. 1995).

REASONS FOR DENYING THE WRIT

I. The Petition is based on an incorrect analysis of *Argersinger vs. Hamlin*, 407 U.S. 25 (1972) and *Scott vs. Illinois*, 440 U.S. 367 (1979), and for that reason does not present a compelling reason to grant a writ of certiorari.

The Petition should be denied because it is grounded on a plainly incorrect legal argument. Starting with its statement of the Question Presented, the Petition seeks to establish immediate imprisonment, rather than deprivation of liberty, as the trigger which quickens the right to counsel in a misdemeanor case. This attempt overlooks plain language in both the *Argersinger* and *Scott* decisions. The concluding paragraph of the *Argersinger* main opinion makes it clear that the ultimate distinction that mandates counsel in misdemeanor cases is State ordered deprivation of personal liberty:

> The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.

407 U.S. at 40.

The same principle is stressed in the *Scott* opinion in commenting on the *Argersinger* case:

> The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty," id., at 32, and to "a case that actually leads to imprisonment even for a brief period," id., at 33. The Chief Justice in his opinion concurring in the result also observed that "any deprivation of liberty is a serious matter." Id., at 41.

440 U.S. 373.

Further, the *Scott* opinion concludes with this pronouncement:

> We therefore hold that the Sixth and Fourteenth Amendments of the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

440 U.S. at 373-74.

Consequently, it is clear that the *Argersinger* and *Scott* cases do not limit the right to counsel in misdemeanor cases to immediate imprisonment cases but extend the protection to cases where there is a sentencing to a term of imprisonment or a deprivation of personal liberty.

The purpose of the right to counsel in the constitutional scheme is for the assurance of a fair trial. See *Powell vs. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon vs. Wainwright*, 372 U.S. 335, 344 (1963); *In Re: Gault*, 387 U.S. 1, 36 (1967). This purpose inculcates that the argument in the Petition for an immediate imprisonment standard is a flawed argument based on a flawed analysis. A fair trial can be assured only if counsel is provided before trial begins. As the opinion in *Argersinger* points out:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

407 U.S. at 40.

Consequently, from this clear holding in *Argersinger*, it is obvious that the judge trying a misdemeanor case must make a firm determination before trial of an unrepresented defendant begins that no term of imprisonment or no restraint of liberty will be imposed in that case. Otherwise the presence of counsel as a factor in a fair trial cannot be accommodated because the benefit of counsel cannot be afforded after the fact.

There was both sentencing to a term of imprisonment and deprivation of liberty in this case. The Respondent was clearly sentenced to thirty days of confinement ("that the Defendant be confined . . . "). There can be no debate that this was sentencing to a term of imprisonment. The term of imprisonment was suspended and the Petitioner placed on probation for two years, provided he "immediately" make certain monetary payments. The fact that imposing a sentence which is suspended on the condition of probation for an extended period is a restraint on liberty under Alabama law cannot be questioned. Under Alabama law a defendant remains under the original sentence (here 30 days of confinement) even though probation is granted. See *Wray vs. State*, 472 So.2d 1119, 1121

(Ala. 1985); *Hamilton vs. State*, 43 Ala. App. 192, 186 So.2d 108, 114 (1965). Probation is subject to conditions which may be any or all of nine statutory conditions and such other unspecified conditions as the sentencing judge may decide to impose. See ALA.CODE § 15-22-52 (1975). Under Alabama law the conditions of probation may be modified and more restrictions on liberty imposed by the sentencing court without a hearing. See *A.R.Crim.P.* 27.2. The conditions of probation may even include restrictions on such basic constitutional rights as speech, association, or assembly. See *Markley vs. State*, 507 So.2d 1043, 1052 (Ala.Crim.App. 1987).

The sentencing court has, of course, authority to revoke probation and to reinstate the suspended sentence. See ALA.CODE § 15-22-54(d)(1) and (2)(1975). Revocation of probation makes a suspended sentence merely delayed imprisonment. In a probation revocation proceeding under Alabama law the State is not required to prove the grounds for revocation by legal evidence or beyond a reasonable doubt. Hearsay is admissible and the standard of proof is the reasonable satisfaction standard. See *A.R.Crim.P.*, 27.6(d)(1); *Powell vs. State*, 485 So.2d 379, 381 (Ala. 1986); *Taylor vs. State*, 706 So.2d 1301, 1302 (Ala.Crim.App. 1997). The procedural safeguards of a trial do not stand between a probationer and imprisonment.

If being immediately incarcerated in a penal facility, as advocated by the Petition, is the only basis for invoking the right to counsel in misdemeanor cases this leaves a large gap in the constitutional ideal of *Argersinger*, *Scott*, and other decisions that no defendant be incarcerated who was compelled to go to trial without the benefit of

counsel. Under those decisions a judge trying a misdemeanor case clearly must determine in advance of trial that the defendant will suffer no imprisonment before a trial of an unrepresented defendant can take place. A judge cannot make the firm determination there will be no imprisonment if he reserves the right to sentence to a suspended sentence and probation. A suspended sentence and probation can amount to merely delayed imprisonment, or imprisonment by indirection. If the rule advocated by the Petition were adopted the constitutional right to counsel could easily be by-passed and a defendant incarcerated following trial or a guilty plea without counsel through the mere expedient, which could well be a ruse or pretense, of giving a suspended sentence and probation and subsequently revoking probation. Approval of such a procedure would amount to approval of a preference for form over substance, which has never been the standard for accommodating constitutional rights.

For the reasons discussed, the Petition in this case mischaracterizes the true holding in the *Argersinger* and *Scott* cases and advocates a standard that is clearly inconsistent with the rationale of those cases. The Petition should be denied as not presenting a compelling reason for issuance of a writ under Supreme Court Rule 10 because it seeks relief that is clearly inconsistent with established constitutional principles.

II. The State court decision could have been based on State law rather than Federal law, and therefore the Petition does not present a compelling reason for issuance of a writ of certiorari.

Notwithstanding the rules articulated in the more recent decisions of this Court for finding discretionary jurisdiction when there is a question of whether State or Federal law was the basis for a State court decision (such as *Arizona vs. Evans*, 514 U.S. 1 [1995] and *Michigan vs. Long*, 463 U.S. 1032 [1983]), certiorari remains a matter of discretion which should only be granted for "compelling reasons". SUP.CT.R.10. This Court retains the discretionary authority to decline jurisdiction and deny certiorari if a petition does not demonstrate a compelling reason.

If a State court decision could properly rest on State law, even if the State court decision cited Federal law as authority, this fact shows an absence of a compelling reason as required by Rule 10. This case is such a case. Although the decision of the Alabama Supreme Court discusses and relies on Federal constitutional principles and decisions, the decision could just as easily have rested solely upon Alabama law. The Alabama Constitution guarantees the right to counsel in criminal prosecutions. See ALA. CONST. § 6 (1901). Further, the Alabama Rules of Criminal Procedure, which have been in effect in Alabama since January 1, 1991, have explicit requirements for counsel and the procedure by which counsel will be provided or can be waived. See *A.R.Crim.P.* 6.1. The State law provisions would have required counsel for the Respondent, or a valid waiver of counsel, in this case.

This case, as is apparent from the opinion of the Alabama Supreme Court, primarily involved the question of whether the Respondent was properly notified of his right to counsel and effectively waived it under Alabama law, not a question of indigency and the right to appointed counsel. The Alabama Supreme Court decided there had not been a valid notice and a valid waiver, citing primarily State precedents (See Petitioner's Exhibit 35-36). This shows the decision the Petition seeks to review possibly involved an inter-relationship between State procedural and substantive rights and Federal rights (see *Duncan vs. Tennessee*, 405 U.S. 127 [1972]), but could clearly have been based on State law. This circumstance shows a lack of a compelling reason, and is an additional reason for denying the Petition in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests the Court to deny the Petition.

Respectfully submitted,

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APPENDIX

Alabama Constitution §6

Sec. 6. Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue.

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

Alabama Code §15-22-50 (1975)

§ 15-22-50. Authority of circuit and district courts to suspend sentence and place convicted person on probation.

Circuit courts and district courts, subject to the provisions and conditions hereinafter provided, may suspend execution of sentence and place on probation any person convicted of a crime in any court exercising criminal jurisdiction. The court shall have no power to suspend the execution of sentence imposed upon any person who has been found guilty and whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years. Except as provided in the preceding sentence, the court, after a plea of guilty, after the turning of a verdict of guilty by the jury or after the entry of a judgment of guilty by the court, may suspend execution of sentence and place the defendant on probation, or may impose a fine within the limits fixed by law and also place the defendant on probation. (Acts 1939, No. 278, p. 434; Code 1940, T. 42, § 19; Acts 1955, No. 480, p. 1093; Acts 1975, No. 1205, § 10-101; Acts 1985, 2nd Ex. Sess., No. 85-905, p. 177, § 2.)

Alabama Code §15-22-52 (1975)

§ 15-22-52. Conditions of probation.

The court shall determine and may at any time modify the conditions of probation and may include among them the following or any other conditions. Such conditions may provide that the probationer shall:

(1) Avoid injurious or vicious habits;

(2) Avoid persons or places of disreputable or harmful character;

(3) Report to the probation officer as directed;

(4) Permit the probation officer to visit him at his home or elsewhere;

(5) Work faithfully at suitable employments as far as possible;

(6) Remain within a specified place;

(7) Pay the fine imposed or costs or such portions thereof as the court may determine and in such installments as the court may direct;

(8) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court; and

(9) Support his dependents to the best of his ability. (Acts 1939, No. 278, p. 434; Code 1940, T. 42, § 22.)

Alabama Code §15-22-54(d) (1), (2) (1975)

§ 15-22-54. Period of probation; termination of probation upon showing of substantial compliance; arrest and disposition of person violating terms of probation.

(1) If the defendant violates a condition of probation or suspension of execution of sentence, the court,

after a hearing, may implement one or more of the following options:

a. Continue the existing probation or suspension of execution of sentence.

b. Issue a formal or informal warning to the probationer that further violations may result in revocation of probation or suspension of execution of sentence.

c. Conduct a formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions of probation.

d. Modify the conditions of probation or suspension of execution of sentence, which conditions may include the addition of short periods of confinement.

e. Revoke the probation or suspension of execution of sentence.

(2) If the court revokes probation, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence, including any option listed in subdivision (1).

Alabama Rules of Criminal Procedure 6.1

RULE 6.1 RIGHT TO COUNSEL; WAIVER OF RIGHT TO COUNSEL

(a) Right to Counsel. A defendant shall be entitled to be represented by counsel in any criminal proceedings held pursuant to these rules and, if indigent,

shall be entitled to have an attorney appointed to represent the defendant in all criminal proceedings in which representation by counsel is constitutionally required. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

(b) Waiver of Right to Counsel. A defendant may waive his or her right to counsel in writing or on the record, after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forgo that right. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. When a defendant waives the right to counsel, the court may appoint an attorney to advise the defendant during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

If a nonindigent defendant appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the cause shall proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives his right under this rule. If the indigent defendant continues to refuse appointed counsel, the cause shall proceed.

(c) Withdrawal of Waiver. A defendant may withdraw a waiver of the right to counsel at any time but will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel.

Alabama Rules of Criminal Procedure 27.2

RULE 27.2 MODIFICATION AND CLARIFICATION OF CONDITIONS AND REGULATIONS

The sentencing court, with or without a hearing, may modify or clarify any condition or regulation imposed by it and any instructions issued by a probation officer. A probation officer may modify or clarify any instructions which the officer has issued. A probationer or a probation officer, at any time prior to absolute discharge, may request the sentencing court to modify or to clarify any condition or regulation. The sentencing court may, where appropriate, hold a hearing on such request. A written copy of any order of modification or clarification shall be given to the probationer, following which the probationer shall have ten (10) days to request a hearing on said order of modification or clarification.

Alabama Rules of Criminal Procedure 27.6(d) (1)

RULE 27.6 REVOCATION OF PROBATION

(d) Nature of the Hearing.

(1) The judge must be reasonably satisfied from the evidence that a violation of the conditions or regulations of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and to cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

Supreme Court, U.S.
FILED
JUL 19 2001
OFFICE OF THE CLERK

No. 00-1214

In The

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

JOINT APPENDIX

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Petition For Certiorari Filed January 25, 2001
Certiorari Granted May 14, 2001

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RELEVANT DOCKET ENTRIES

In the Etowah County District Court:

1. January 7, 1997	Complaint filed in Etowah County District Court charging Respondent with third degree assault
2. March 21, 1997	Following jury trial, Respondent adjudged guilty of third degree assault and fined $500, restitution of $333.75, and court costs
	Respondent enters oral notice of appeal for trial de novo in Etowah County Circuit Court

In the Etowah County Circuit Court:

3. April 10, 1997	Complaint filed in Etowah County Circuit Court charging Respondent with third degree assault
4. March 23, 1998	Following jury trial, Respondent convicted of third degree assault
5. March 24, 1998	Respondent sentenced to thirty days in the Etowah County Detention Center, suspended, to serve two years' unsupervised probation and ordered, as one condition of probation, to pay $500 fine, $25 in reparations, restitution of $51.69, and court costs

In the Alabama Court of Criminal Appeals:

6. October 2, 1998	Alabama Court of Criminal Appeals issues published opinion declaring Respondent, a misdemeanor defendant, entitled to counsel where the sentence of imprisonment conditionally suspended and remands case for determination whether Respondent waived right to counsel
7. May 28, 1999	On return to remand, Alabama Court of Criminal Appeals issues published opinion concluding Respondent not entitled to counsel upon receipt of suspended sentence of confinement for misdemeanor crime and remands case to ensure trial court satisfied Respondent's right of allocution
8. June 30, 1999	Etowah County Circuit Court reopens Respondent's sentencing hearing and reimposes original thirty-day suspended sentence and various financial levies
9. August 20, 1999	On return to remand, Alabama Court of Criminal Appeals issues unpublished opinion affirming Respondent's sentence
10. August 26, 1999	Respondent files Application for Rehearing in Alabama Court of Criminal Appeals

11. September 24, 1999	Alabama Court of Criminal Appeals overrules Respondent's Application for Rehearing

In the Supreme Court of Alabama:

12. October 5, 1999	Respondent files Petition for Writ of Certiorari in Alabama Supreme Court
13. December 13, 1999	Alabama Supreme Court grants Respondent's Petition for Writ of Certiorari
14. May 19, 2000	Alabama Supreme Court issues published opinion declaring that misdemeanor defendant sentenced to conditionally suspended sentence entitled to Sixth Amendment right to counsel
15. June 2, 2000	Petitioner files Application for Rehearing in Alabama Supreme Court
16. October 27, 2000	Alabama Supreme Court overrules Petitioner's Application for Rehearing

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1997-98

CR-97-1313

Released October 2, 1998

Lereed Shelton

v.

State

Appeal from Etowah Circuit Court

(CC-97-0365)

BASCHAB, JUDGE

The appellant, Lereed Shelton, was convicted in district court of third-degree assault, §13A-6-22, Ala. Code 1975. He appealed his conviction to the Etowah Circuit Court for a trial de novo, and he was again convicted of third-degree assault. The circuit court sentenced him to 30 days imprisonment, but suspended the sentence and placed him on unsupervised probation for two years. The circuit court also ordered the appellant to pay $516.69

restitution as a condition of his probation. This appeal followed.

I.

The appellant argues that the prosecutor's complaint was void because it did not allege an essential element of third-degree assault. Specifically, he contends that the complaint was deficient because it did not include the language "to another person" in describing the intent element of the offense. The complaint alleged that the appellant,

> "with the intent to cause physical injury and did cause physical injury to Kenney L. Campbell by beating him with his fist, in violation of 13A-6-22 of *Code of Alabama 1975*."

(C.R. at 13.) Section 13A-6-22, Ala. Code 1975, provides:

> "(a) A person commits the crime of assault in the third degree if:
>
> "(1) With intent to cause physical injury to another person, he causes physical injury to any person."

"[A] complaint that *substantially* tracks the language of the statute is sufficient to inform the defendant of the charges against which he must defend." *Gentile v. City of Guntersville*, 589 So.2d 809, 810 (Ala. Cr. App. 1991) (emphasis added). Although a minor variation between the language in the complaint and the language of §13A-6-22, Ala. Code 1975, exists, the complaint substantially tracks the language of the statute. Furthermore, the complaint contains sufficient facts and a sufficient description of the elements to " 'inform the [appellant] of the charge so that [he] may prepare a defense and invoke the Double Jeopardy Clause when appropriate.' " *See Hunt v. State*, 642 So.2d 999, 1022 (Ala. Cr. App. 1993), aff'd, 642 So.2d 1060 (Ala. 1994) (quoting Daniel F. McInnis et al.,

Project, *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 Geo. L. J. 853, 1076-81 (1993)). The complaint does not include the words "to another person" in regard to intent. However, the language of the complaint was sufficient to apprise the appellant that the intent to cause physical injury was an element of the offense of third-degree assault so that he could formulate a defense to that charge. Because the complaint contains all the essential elements of the charge, it is valid.

II.

Next, the appellant argues that his rights were violated because the record does not reflect that he knowingly, intelligently, and voluntarily waived his right to counsel. The State argues that the appellant did not have a right to counsel. Therefore, it argues that no waiver was necessary. The appellant was convicted of third-degree assault, a Class A misdemeanor. *See* §13A-6-22, Ala. Code 1975. The right to counsel does not attach in a misdemeanor case if "'"the defendant is not sentenced to a term of imprisonment. If an uncounseled defendant is sentenced to prison [or jail], the conviction itself is unconstitutional."'" *Williams v. City of Phenix City*, 659 So.2d 1004, 1005 (Ala. Cr. App. 1995) (quoting *Minnifield v. City of Alexander City*, 616 So.2d 403 (Ala. Cr. App. 1993)); *see also* Rule 6.1, Ala. R. Crim. P., committee comments (stating that "the right to counsel in misdemeanor cases is limited to cases in which the defendant is actually sentenced to jail"). The circuit court sentenced the appellant to 30 days imprisonment, but suspended the sentence and conditioned probation on the payment of fines, costs, and restitution. The constitutional right to counsel applies in misdemeanor cases where the appellant's sentence of imprisonment is suspended conditionally. *Williams v. City of Phenix City*, 659

So.2d at 1006 (holding that "a conditionally suspended sentence of imprisonment cannot be imposed on an indigent [in a misdemeanor case] who is denied counsel"); *see also Culberson v. State*, 709 So.2d 1327 (Ala. Cr. App. 1997) (holding that Culberson, who had been sentenced to two suspended terms of imprisonment, had a constitutional right to counsel). Therefore, the appellant had a constitutional right to counsel.

"A defendant may always waive the right to counsel but 'the waiver must be intelligently and understandingly made, and [the court] cannot assume that to be the case from a silent record.'" *Culberson*, 709 So.2d at 1328 (quoting *Lake v. City of Birmingham*, 390 So.2d 36, 38 (Ala. Cr. App. 1980)); *see Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "'"If the record is not clear as to the defendant's waiver [of counsel] and request of self-representation, the burden of proof is on the State"'" to show the waiver was knowing, intelligent, and voluntary. *Watkins v. State*, 708 So.2d 236, 240 (Ala. Cr. App. 1997) (emphasis omitted). Nothing in the record indicates that the appellant knowingly, understandingly, and voluntarily waived his right to counsel. Therefore, we remand this case for the circuit court to determine whether the appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. The circuit court shall take the necessary action to see that the circuit clerk makes due return to this court at the earliest possible time and within 42 days of the release of this opinion. The return to remand shall include any transcripts or documents that support the circuit court's findings.

REMANDED WITH INSTRUCTIONS.

Long, P.J., and McMillan, Cobb, and Brown, JJ., concur.

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STATE OF ALABAMA

JUDICIAL DEPARTMENT

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1998-99

Released May 28, 1999

CR-97-1313

Lereed Shelton

v.

State

Appeal from Etowah County Circuit Court

(CC-97-365)

On Return to Remand

COBB, JUDGE

This case was originally assigned to another judge. It was reassigned to Judge Cobb on March 11, 1999.

The appellant, Lereed Shelton, was convicted of third-degree assault in the district court. See § 13A-6-22, Ala. Code 1975. He appealed his conviction to the Etowah Circuit Court for a trial de novo; he was again convicted of third-degree assault. The circuit court sentenced him to

30 days' confinement, but suspended the sentence and placed him on unsupervised probation for two years. As a condition of his probation, Shelton was also ordered to pay a $500 fine, court costs, and $516.69 in restitution, as a condition of his probation. In this opinion, we address the trial court's order on return to remand and the issues raised by Shelton that we did not address in our first opinion. *See Shelton v. State*, [Ms. CR-97-1313, October 2, 1998] ___ So.2d ____, ____ (Ala.Cr.App. 1998).

I.

On October 2, 1998, we remanded this cause for the trial court to determine whether the appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. In its order on return to remand, the trial court made the following findings:

> "1. Although the Defendant never made a statement on the record specifically waiving his right to counsel, it is the opinion of this Judge that the Defendant fully understood his right to employ counsel and in fact did a creditable job of defending his own case both at the District and Circuit Court levels.
>
> "2. Repeatedly during the trial of his case, the Court informed the defendant about the problems of [his] representing himself and the fact that he was a lay-person would not allow him to circumvent the rules of evidence.
>
> "3. The defendant appeared to be an intelligent, articulate, shrewd businessman fully aware of what was going on in the courtroom and aware of the criminal charge against him and the possibilities of punishment (he was found guilty in District Court and received a fine and [was] ordered to pay restitution)."

In our October 2 opinion, we held that Shelton has a constitutional right to counsel. *See Shelton*, ___ So.2d at ____. However, in so holding, we overlooked clear precedent to the contrary. Upon reconsideration, we find that Shelton did not have a Sixth Amendment right to counsel because he did not receive a sentence that resulted in actual confinement.

We apply the same rationale we applied in *Benson v. City of Sheffield*, [Ms. CR-98-0280, April 30, 1999] ____ So.2d ____, ____ (Ala.Cr.App. 1999):

> "In *Argersinger v. Hamlin*, 407 U.S. 25, 37-40 (1972), the United States Supreme Court held:
>
> " '[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial.
>
> "....
>
> " 'Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.
>
> " 'The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.' "

The *Argersinger* Court expressly reserved ruling on "the requirements of the Sixth Amendment as regards the

right to counsel where [actual] loss of liberty is not involved." *Id.* at 37. In *Scott v. Illinois*, 440 U.S. 367, 373 (1979), the United States Supreme Court affirmed an indigent appellant's conviction for theft; the conviction was obtained without the benefit of counsel in a case where the only punishment imposed was a $50 fine, although imprisonment was authorized. The Court wrote:

> "[T]he central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointed counsel."

In *Salter v. State*, 470 So.2d 1360, 1362 (Ala.Cr.App. 1985), this court held that "the constitutional right to counsel is limited to criminal offenses resulting in actual imprisonment." This court followed the guidelines set out in *Argersinger* and *Scott* and chose not to enlarge the rights of those persons convicted of misdemeanors who were not sentenced to actual imprisonment.

We cited this same caselaw in *Jowers v. City of Selma*, 688 So.2d 278 (Ala.Cr.App. 1996), in deciding a case with similar circumstances. In holding that the appellant did not have a right to counsel in a misdemeanor case in which the sentence was suspended, we wrote:

> "[The defendant's] sentence of probation does not constitute actual imprisonment. Therefore, under *Argersinger*, *Scott*, and *Salter*, [the defendant's] Sixth Amendment rights were not violated. If in the future, the trial court revokes [the defendant's] probation and sentences him to jail, that revocation may constitute a violation of [the defendant's] Sixth Amendment right to appointed counsel. However, we will not reverse the trial court on the mere possibility that, at a remote

and future date, [the defendant's] Sixth Amendment right may be violated."

688 So.2d at 279-80.

Our October 2, 1998, opinion, authored by Judge Montiel, cited *Williams v. City of Phenix City*, 659 So.2d 1004 (Ala.Cr.App. 1995), a case that preceded *Jowers*, as precedent for its holding that Shelton had a Sixth Amendment right to counsel. In *Williams*, this court held that a conditionally suspended sentence of imprisonment could not be imposed on an indigent defendant who had been denied counsel. However, in that case, the trial court conditioned the defendant's release on the payment of the imposed fines and costs, and the defendant's inability to pay resulted in actual imprisonment. While Shelton's suspension was also conditioned on the payment of fines and court costs, there is no indication in the record that he was ever actually confined because of an inability to pay.

The October 2, 1998, opinion also cited *Culberson v. State*, 709 So.2d 1327 (Ala.Cr.App. 1997). In *Culberson*, the defendant, acting pro se, pleaded guilty to two counts of reckless endangerment and one count of harassing communications; he was sentenced to 12 months' confinement for each count, the sentences to run concurrently. The sentences were suspended, and Culberson was placed on 24 months' supervised probation. On the issue whether the trial court erred in not advising Culberson of his right to counsel, this court acceded to the State's request and remanded the case to the trial court for a hearing to determine Culberson's indigence, to determine whether Culberson was properly advised of his right to counsel, and to determine whether he waived his

right to counsel.[1] In doing so, this court relied only on *Williams*, and completely ignored its more recent application of *Argersinger*, *Scott*, and *Salter* in *Jowers*.

This court will not apply the holding in *Williams* in a situation where there is no evidence in the record that the appellant has actually been deprived of liberty because of the conditions of release from confinement. When the record reflects that the appellant received a suspended sentence of confinement for a misdemeanor conviction and was never subjected to actual imprisonment, this court's holding in *Jowers* is the correct interpretation of the law concerning a defendant's Sixth Amendment right to counsel. Unless an appellant has actually suffered a deprivation of liberty, there is no Sixth Amendment right to counsel in a misdemeanor prosecution in which a sentence was suspended. We will not reverse the trial court "on the mere possibility that, at a remote and future date, [Shelton's] Sixth Amendment right may be violated" by a later attempt to revoke his probation and impose a sentence of confinement. *Jowers*, 688 So. 2d at 280.

It is certainly the "best practice" for all trial courts when disposing of misdemeanor cases to fully advise defendants of their rights and to obtain signed waivers of the right to counsel. Nevertheless, extending all the protections afforded defendants facing felony charges to those misdemeanor defendants who are not in danger of being incarcerated would be a huge leap from the current state of the law in Alabama. It is time for this court to reapply the holdings in *Salter* and *Jowers*. We herby [sic]

---

[1] The case was also remanded for the trial court to vacate the sentence ordering 12 months' confinement and imposing $750 fine on the conviction for harassing communications, a Class C misdemeanor, and to resentence Culberson on that count because the sentence exceeded the limitations provided by statute (three months' confinement and a $500 fine).

overrule *Williams* and *Culberson*, to the extent that those opinions hold that a misdemeanor defendant is entitled to counsel if the defendant is sentenced to conditionally suspended confinement, regardless of whether the defendant is actually incarcerated.

Because Shelton never was actually imprisoned, he had no Sixth Amendment right to counsel, and there was no requirement for the trial court to inform him of such a right or to determine whether he intelligently waived such a right. The trial court did not err when it did not conduct an inquiry to determine Shelton's indigence and, had it found Shelton indigent, to advise him of the right to appointed counsel or to determine whether Shelton was affirmatively waiving such a right.

II.

Shelton contends that his lack of arraignment invalidates his conviction. Specifically, Shelton argues that Rule 14.1(c), Ala.R.Crim.P., governs the trial court and affirmatively requires arraignment in an appeal de novo to a circuit court. We agree, but because Shelton failed to object to his lack of arraignment, he waived arraignment by remaining silent. *See Johnston v. City of Irondale*, 671 So.2d 777, 779 (Ala.Cr.App. 1995) (defendant appealed to the circuit court for a trial de novo and waived arraignment by failing to object to his lack of arraignment); *Singleton v. City of Tuscaloosa*, 557 So.2d 565, 566 (Ala.Cr.App. 1990) (citing *Watts v. State*, 460 So.2d 204 (Ala. 1983)). Moreover, the purpose of arraignment is to ensure that the accused is familiar with the charges brought against him. *See Singleton*, 557 So.2d at 567. Because Shelton was tried in the district court for the same charge, he was familiar with the charge brought against him in the circuit court. In addition, Shelton testified that he remembered pleading not guilty in the district court to third-degree assault. (Supp. R. 42.)

III.

Shelton alleges that the State prosecuted him for third-degree assault in an effort to compel him to pay the victim, Kenny Campbell, for property damage to Campbell's car.[2] At the close of a preliminary hearing, the trial judge asked the parties if they had any further matters to discuss before trial. The State responded:

> "Nothing further, Judge, except that [Kenny Campbell] just wants his truck paid for and he is willing to accept payment for his truck and go on about his business. If Mr. Shelton might be willing to do that."

(R. 8-9.) The trial judge stated that he refused to get involved in settling a civil case and instructed the parties that he would hear only evidence concerning the alleged assault. (R. 9.) Shelton argues that the State's remarks indicated that the motivation for prosecuting Shelton was to collect a private debt.

Shelton failed to properly preserve this issue for review. Shelton should have objected when the State made these remarks or filed a motion to dismiss, asserting this ground. *See King v. State*, 401 So.2d 226, 232 (Ala.Cr.App. 1981); *Harris v. State*, 378 So.2d 257, 262 (Ala.Cr.App. 1979). Even if Shelton had properly pre-

---

[2] The record indicates that prior to the physical confrontation between Shelton and Campbell, Shelton and Campbell were involved in an automobile collision, which resulted in damage to Campbell's car. (R. 17-21.) Campbell allegedly unsuccessfully attempted to obtain reimbursement from Shelton for the damage. (R. 22-24.) The State presented evidence showing that Campbell went to a store where Shelton worked to gain information about Shelton's insurance company. Shelton's son began "slugging" Campbell. While Shelton's son and another man held Campbell, Shelton repeatedly hit Campbell in the ribs and the face. (R. 25-27.)

served this issue, his argument is without merit. This prosecution did not arise because Shelton allegedly owed Campbell money; it arose because Shelton punched Campbell with his fists, in violation of §13A-6-22, Ala. Code 1975. *See Holland v. State*, 440 So.2d 1236 (Ala.Cr.App. 1983).

IV.

After the jury began its deliberations, a juror sent a note to the trial judge asking, "Was the fact that Mr. Shelton did not take any action to resolve this problem — could that be abetting the action in the altercation?" (C. 80.) Upon receipt of the note, the trial judge stated that he would recharge the jury on the concepts of aiding and abetting in an effort to solve the confusion. (R. 158.) Both the State and Shelton agreed to the supplemental charge. (R. 159.) After the trial judge recharged the jury, Shelton informed the trial judge that he was satisfied with the supplemental charge. (R. 162.)

On appeal, Shelton contends that the trial judge did not adequately respond to the juror's inquiry. Shelton has waived this issue because he failed to object to the trial judge's supplemental instruction. *See Murphy v. State*, 641 So.2d 1256, 1260 (Ala.Cr.App. 1993). Moreover, at trial, Shelton stated that he was satisfied with the instruction.

V.

During a preliminary hearing, the State made a motion in limine, requesting that Shelton be prohibited from referring to, during his opening statements, a prior conviction of Kenny Campbell, the victim, for possession of a [sic] marijuana. (R. 3.) The trial judge granted the State's motion, holding that Shelton could not refer to the evidence in his opening statement but that he could try to admit the evidence to impeach Campbell when Campbell

testified. (R. 5-6.) Shelton argues that the trial judge's ruling denied him his right to include a statement of what he expected the evidence to show in his opening statement.

A trial judge's decision to grant or deny a motion in limine is within the judge's sound discretion. *See Zasadil v. City of Montgomery*, 594 So.2d 231, 232 (Ala.Cr.App. 1991); *Primm v. State*, 473 So.2d 1149, 1158 (Ala.Cr.App. 1985). Moreover, the scope of an opening statement rests "within the sound discretion of the trial judge." *Hunt v. State*, 659 So.2d 933, 941 (Ala.Cr.App. 1994). The trial judge did not abuse his discretion by preventing Shelton from referring to the convictions in his opening statement because Shelton's argument is without merit. The purpose of an opening statement is for " 'each party to give the jury an overview of what the evidence will show.' " *Frazier v. State*, [Ms. CR-95-2222, January 15, 1999] ___ So.2d ____, ____ (Ala.Cr.App. 1999) (quoting *McKinney v. State*, 654 So.2d 95, 98 (Ala.Cr.App. 1995)).

In his brief, Shelton contends that he should have been able to refer to the prior conviction because the main issue was the credibility of Campbell, the victim. He cites Rule 609(a)(1), Ala.R.Evid., as authority. Shelton, however, has misconstrued Rule 609. Rule 609 does provide for a method of attacking the credibility of a witness with prior convictions. *See Baxter v. State*, 723 So.2d 810, 819 (Ala.Cr.App. 1998); Rule 404(a)(3), Ala.R.Evid. (listing Rule 609 as a valid form of impeachment). The credibility of a witness, however, is not at issue until the witness actually takes the stand to testify. *See* Rule 404(a)(3), Ala.R.Evid., Advisory Committee's Notes (citing C. Gamble, *Character Evidence: A Comprehensive Approach* 56 (1987)); C. Gamble, *McElroy's Alabama Evidence*, §140.01(1)(a) (5th ed. 1996). Thus, the trial judge correctly granted the State's motion in limine, prohibiting

Shelton from referring to the prior conviction until Campbell testified.

VI.

Shelton contends that the trial court erred when it failed to grant his motion for a mistrial, which he made during the testimony of Officer Debbie Barnett. Shelton called Officer Barnett as a witness in an effort to elicit testimony concerning a prior complaint Shelton filed against Campbell. (R. 86.) The record indicates that the officer was unsure of the subject matter of her testimony. In fact, her testimony showed that she thought she was being called to testify for another case. During Shelton's direct examination of Officer Barnett, the following occurred:

"[SHELTON]: Ms. Barnett, I'm Lereed Shelton from Mountaintop — did they ever approach you about swearing a warrant out or getting charges brought against Mr. Kenny Campbell?

"[OFFICER BARNETT]: This [case concerns] Mr. Campbell?

"[SHELTON]: Yes.

"[OFFICER BARNETT]: I'm sorry, Mr. Shelton. I thought this [case] was [about] the assault charge that Michael Sanders made against you back in — when I took the picture back in 1994, which is not on this case. I'm sorry.

"[DEPUTY DISTRICT ATTORNEY]: May we approach the bench?

"THE COURT: All right.

"UNIDENTIFIED WITNESS: That is on a sexual abuse case, a case with my daughter.

"[OFFICER BARNETT]: No, not on this one, that's another one.

"[SHELTON]: I object.

"[OFFICER BARNETT]: That's not the same one. That's another one.

"THE COURT: Wait a minute. Time out.

"[SHELTON]: I would like a mistrial."

(R. 84-85.) A sidebar discussion followed, and Shelton told the trial judge his purpose for calling Officer Barnett to testify. Shelton seems to have based his motion for a mistrial on the ground that Officer Barnett's answer was nonresponsive. (R. 86.) The trial judge sustained Shelton's objection, striking the response from the record, but the trial judge did not rule on Shelton's motion for a mistrial.

Absent a timely objection and an adverse ruling, nothing is preserved for appellate review. *See Pace v. State*, 714 So.2d 332, 334 (Ala. 1997) (citing *Biddie v. State*, 516 So.2d 846 (Ala. 1997)). The portion of the record reproduced above indicates that Shelton failed to obtain an adverse ruling on his motion. It is the appellant's duty to preserve an issue by obtaining an adverse ruling on the record. *See Berryhill v. State*, 726 So.2d 297, 302 (Ala.Cr.App. 1998). Shelton made no effort to elicit an adverse ruling; thus, this issue is procedurally barred from our review. Moreover, Shelton neither requested nor objected to the trial judge's failure to give a curative instruction. *See Goodwin v. State*, [Ms. CR-96-0574, August 14, 1998] ___ So.2d ___, ___ (Ala.Cr.App. 1998); *Davis v. State*, [Ms. CR-96-2341, May 29, 1998] ___ So.2d ___, ___ (Ala.Cr.App. 1998).

VII.

Shelton argues that the trial judge misinformed him, during his sentencing hearing, about the period that Shelton had for filing post-trial motions. He claims that this misinformation violated his due process rights. After the trial judge sentenced Shelton, the trial judge instructed him as follows:

> "You have the right to appeal the case, if you want to, to the Court of Criminal Appeals, and if you want to do that, you have got to do it within 42 days, counting today. If you cannot afford an attorney or a transcript and you can show that you are indigent, then we would appoint you an attorney and furnish you with a free transcript. You are free to file any post trial motions and appeal, but you must do so within 42 days. Do you understand that?"

(R. 168.) In his brief, Shelton claims that he understood the trial judge to be instructing him that he had 42 days to file a post-trial motion, instead of 30 days, which is the correct number of days. *See* Rule 24, Ala.R.Crim.P. This issue is moot because the record does not show that Shelton attempted to file any post-trial motions after 30 days.

VIII.

Shelton contends that the trial judge improperly ordered him to pay restitution. Specifically, Shelton argues that a trial judge must hold a restitution hearing, which did not occur in this case, before the judge can order the accused to pay restitution. Shelton correctly cites §15-18-67, Ala. Code 1975, in support of his argument. He failed, however, to properly preserve the issue for appellate review. Shelton should have objected at trial to the trial judge's failure to conduct a restitution hearing. *See Perkins v. State*, 715 So.2d 888, 892 (Ala.Cr.App. 1997); *Dollar v. State*, 687 So.2d 207, 208 (Ala.Cr.App.), rev'd on other grounds, 687 So.2d 209 (Ala. 1996).

IX.

Shelton argues that the trial court committed reversible [sic] when it failed to give Shelton the opportunity to make a statement in his own behalf prior to imposing the sentence. Rule 26.9(b)(1), Ala.R.Crim.P., mandates that a trial court give a defendant an opportunity to make a statement in his behalf before the imposition of his sentence. *See, also, Davis v. State*, [Ms. CR-97-2301, March 26, 1999] ___ So.2d ____, ____ (Ala.Cr.App. 1999). All defendants are "entitled to an allocution, regardless of the gravity of the sentence imposed." *Id.* (citing Rule 26.9, Ala.R.Crim.P., Committee Comments). Moreover, the failure to afford a defendant an allocution renders his sentence erroneous. *See Lancaster v. State*, 638 So.2d 1370, 1373 (Ala.Cr.App. 1993).

The judgment order contained in the record indicates that Shelton was afforded an allocution, but the transcript of the sentencing hearing does not show that Shelton was afforded that opportunity before the trial judge imposed sentence. (C. 16; R. 164-67.) In reading the transcript of the sentencing hearing, we note that Shelton did make comments and express concerns to the trial court. Before the imposition of sentence, the trial judge asked Shelton and the district attorney about the sentence that Eddie Shelton, Shelton's son, had received for the same assault. The following occurred,

> "[SHELTON]: That case don't have anything to do with this one, your Honor. Why should –
>
> "THE COURT: Well, I know. I'm just trying to set the sentence now. The jury — $516.69 is what is in the evidence.

"[STATE]: That is what we would submit then.

"THE COURT: Okay. Thirty days suspended, $516.69 restitution, $500 fine, which is what [the trial judge in Eddie Shelton's case] did.

"[SHELTON]: That is not what the other sentence was.

"THE COURT: Well, this is a whole new day. You got a new day in court. I can set the sentence. I can give you a year ... and not suspend the sentence.

"[SHELTON]: Okay.

"THE COURT: But I'm not going to do that. Thirty days suspended, $500 fine, $516.69 restitution.

"[STATE]: Two years' unsupervised probation?

"THE COURT: Yes, unsupervised probation. Anything further?"

(R. 166-67.) Although the transcript indicates that the trial judge allowed Shelton to make statements during his sentencing, the trial judge failed to make it clear that Shelton had a right to make a statement in his behalf to the court. This opportunity is absolutely required. *See* Rule 26.9(b)(1), Ala.R.Crim.P., Committee Comments; *Burks v. State*, 600 So.2d 374, 382 (Ala.Cr.App. 1991). Even though the trial judge was not required to invoke any "magic" words, the transcript does not make it clear that Shelton understood that he had a right to make a statement as to why his sentence should not have been imposed. *See Jones v. State*, 555 So.2d 333, 336 (Ala.Cr.App. 1989) (stating that even though the trial judge did not use any magic words, the record reflects that the defendant was, in fact, given the opportunity to make a statement). Because the transcript does not clearly indicate that Shelton was aware of this right, a

discrepancy exists between the transcript and the judgment order; therefore, this case must be remanded to the trial court to determine if Shelton was afforded allocution. *See Davis*, supra; *Burks*, 600 So.2d at 383. If the trial court determines that Shelton was not given the opportunity to make a statement in his behalf before the imposition of his sentence, the trial court must conduct a new sentencing hearing and allow for a proper allocution. The trial court shall take all necessary action to allow return to remand to be filed with this court within 42 days of the date of this opinion.

X.

Shelton contends that his trial was unfair because of the cumulative effect of the trial judge's rulings, the prosecutor's conduct, and the conduct of the prosecution's only witness, Campbell. Specifically, Shelton argues that he should be granted a new trial because (1) he was not represented by counsel, (2) he was never arraigned, (3) he was not fully informed of the charges against him or his possible range of punishment, (4) the district attorney's complaint against him was insufficient, (5) the trial judge improperly restricted the scope of his opening statement, (6) the trial judge's preliminary instructions to the jury did not properly characterize the charge against him, (7) Campbell's self-serving statements during his testimony prejudiced Shelton, (8) the prosecutor improperly asked Campbell leading questions during direct examination, (9) the trial judge failed to instruct the jury to disregard the unresponsive statement made by Officer Barnett, (10) the trial judge did not properly respond to the jury's inquiry during deliberations, (11) he was not afforded allocution, and (12) the trial judge incorrectly informed him that he had 42 days in which to file any post-trial motions.

We have addressed Shelton's issues 1, 2, 5, 9, 10, 11, and 12 in this opinion. In addition, we addressed Shel-

ton's fourth issue in our first opinion dealing with this case. *See Shelton v. State*, [Ms. CR-97-1313, October 2, 1998] ___ So.2d ____, ____ (Ala.Cr.App. 1998).

Shelton contends that he was not fully informed of the charge against him or of the possible range of punishment. Shelton has failed to preserve either issue for review. *See Biddie*, 516 So.2d at 847. In addition, Shelton was not entitled to be informed of the maximum and minimum possible punishment, because he did not enter a guilty plea. Moreover, Shelton tried his case in the district court before appealing for a trial de novo in the circuit court; thus, he was well aware of the charge against him.

Shelton did not properly preserve his argument that the trial judge's preliminary instructions to the jury improperly characterized the charge against him. No objection appears on the record. *See* Rule 21.3, Ala.R.Crim.P.; *Phillips v. State*, 726 So.2d 292, 293 (Ala.Cr.App. 1998). Moreover, Shelton's claim is without merit. A review of the instructions indicates that the trial judge did nothing more than explain the elements of assault in the third degree, as defined in §13A-6-22, Ala. Code 1975, and recite the charge as alleged in the complaint. (R. 12-14.) These instructions did not mischaracterize third-degree assault.

Shelton argues that his trial was prejudiced by what he says was Campbell's self-serving testimony during direct and cross-examination. Shelton failed to preserve this issue for review because he failed to object on this basis at any point during Campbell's testimony. *See Biddie*, 516 So.2d at 847. Shelton also contends that the prosecutor improperly asked Campbell leading questions during direct examination, but he failed to preserve the issue by objecting to the manner of questioning on this ground. *See id.*

For the above-mentioned reasons, Shelton's conviction of assault in the third-degree is due to be affirmed and the case remanded to ensure that Shelton was afforded allocution.

AFFIRMED AS TO CONVICTION AND REMANDED.

McMillan and Fry, JJ., concur. Baschab, J., dissents with opinion in which Long, P.J., joins.

BASCHAB, J., DISSENTING.

I disagree with the majority opinion, which holds that there is no right to counsel in a misdemeanor case when a trial court imposes a sentence of imprisonment and then suspends that sentence or places the defendant on probation. The majority states that "extending all the protections afforded defendants facing felony charges to those misdemeanor defendants who are not in danger of being incarcerated would be a huge leap from the current state of the law in Alabama." However, a defendant whose sentence has been suspended or probated *is* in danger of being incarcerated because the court retains the authority to revoke a suspended or probated sentence and to reinstate the remaining term of imprisonment. Therefore, I maintain the position I advanced in my dissent in *Benson v. City of Sheffield*, [Ms. CR-98-0280, April 30, 1999] ___ So.2d ____ (Ala. Cr. App. 1999), that a defendant facing a suspended or probated sentence is entitled to counsel. Because I believe that the appellant had a right to counsel and because the record does not reflect that the trial court advised the appellant of his right to withdraw his waiver of counsel, I believe this case should be remanded for a new trial. *See Farid v. State*, 720 So.2d 998, 999 (Ala. Cr. App. 1998). Therefore, I must respectfully dissent.

IN THE CIRCUIT COURT OF
ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA *

v. *CASE NO. CC-97-365-WWC

LEREED SHELTON *

AMENDED SENTENCING ORDER

This case coming on for hearing on return to Remand, the Trial Court, after reviewing its prior sentencing, is satisfied that the Defendant was afforded and, in fact, participated in an allocution. However, in an abundance of caution, the Court reopened the Sentence hearing to allow Defendant further allocution, whereupon, the Defendant carried out an extensive tirade of the Criminal Justice System, Sheriff's Department and District Attorney.

Therefore, in accordance with the Jury Verdict, it is ordered by the Court that the Defendant is guilty of the offense of Assault, 3rd Degree, as charged in the complaint.

On this 30th day of June, 1999, this cause coming on for Sentencing and the Deputy District Attorney being present and the Defendant, Pro Se, and being fully informed of his right to counsel and waiving same on the record, and after Defendant's allocution, it is hereby

ORDERED by the Court that the Defendant be confined in the Etowah County Detention Center for a period of thirty (30) days, sentence suspended and Defendant placed on two (2) years unsupervised probation. As a condition of probation, Defendant is ordered to pay court costs, a $500.00 fine, $25.00 as a Crime Victim's Assessment, and $516.69 restitution for the benefit of the victim,

Kenny E. Campbell, all amounts ordered payment [sic] to the Clerk immediately.

DONE this the 30th day of June, 1999.

/s/William W. Cardwell

William W. Cardwell, Circuit Judge

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 300 DEXTER AVENUE
P.O. BOX 301555
MONTGOMERY, AL 36130-1555

FRANCIS ALLEN LONG, SR.
Presiding Judge
H. WARD McMILLAN
SUE BELL COBB
PAMELA W. BASCHAB
JAMES H. FRY
Judges

Clerk's Office
(334) 242-4590

Released August 20, 1999

MEMORANDUM

On Return to Remand

CR-97-1313 Etowah Circuit Court No. 97-365

Lareed Shelton v. State

Affirmed by memorandum. On May 28, 1999, we remanded this case to the trial court for the second time in order for the trial court to determine if Shelton was afforded allocution at sentencing. In our opinion remanding the case, we affirmed the conviction, holding that Shelton did not have a Sixth Amendment right to counsel because he did not receive a sentence that resulted in actual confinement. Judge Baschab dissented from that holding and Judge Long joined her dissent.

On June 30, 1999, the trial judge, out of an abundance of caution, granted Shelton a new sentencing hearing. Shelton again appeared before the court pro se, was advised of his right to counsel, and affirmatively waived that right. After advising Shelton of his right to speak

before sentencing, the trial judge allowed Shelton to make a lengthy statement to the court. The court then resentenced Shelton to 30 days in jail, suspended, with two years unsupervised probation, court costs, a $500 fine, a $25 Crime Victim Assessment, and $516.69 restitution.

We find that the trial court complied with the requirements of Rule 26.9(b)(1), Ala.R.Crim.P., in advising Shelton of his allocution rights at his resentencing. In accordance with the rationale set out in our earlier decision on return to remand, the sentence is now due to be affirmed.

McMillan and Fry, JJ., concur. Long, P.J., and Baschab, J., adhere to original dissents.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
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FRANCIS ALLEN LONG, SR.
Presiding Judge
H. WARD McMILLAN
SUE BELL COBB
PAMELA W. BASCHAB
JAMES H. FRY
Judges

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Hon. Billy Yates, Circuit Clerk
Hon. William H. Mills, Attorney
Lereed Shelton, Pro Se

RE: CR-97-1313

Lereed Shelton v. State of Alabama (Appeal from Etowah Circuit Court: CC97-365).

Dear Sir or Madam:

You are hereby notified that on September 24th, 1999 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled. 39(k) Motion Denied.

Lane W. Mann
Clerk
Court of Criminal Appeals

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1990031

Released May 19, 2000

Ex parte LeReed Shelton

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Lereed Shelton

v.

State)

(Etowah Circuit Court, CC-97-365; Court of Criminal Appeals, CR-97-1313)

JOHNSTONE, Justice.

In district court Lereed Shelton was convicted of assault in the third degree, a violation of §13A-6-22, Ala. Code 1975. The district court ordered him to pay a $500

fine and $333.75 as restitution to the victim. Shelton appealed for a trial de novo in circuit court. Pursuant to a jury trial during which Shelton represented himself, Shelton was convicted of assault in the third degree. The sentence of the trial court imposed 30 days' imprisonment, a $500 fine, restitution of $516.69 payable to the victim, and court costs. The trial court, however, suspended the 30 days' imprisonment, placed Shelton on probation, and imposed certain conditions, including timely payment of the sums ordered.

Shelton appealed to the Court of Criminal Appeals, which, holding that he *did have* a constitutional right to counsel because he had received a sentence to suspended imprisonment, remanded his case for the trial court to determine whether Shelton made a knowing, intelligent, and voluntary *waiver* of his right to counsel. *Shelton v. State*, [Ms. CR-97-1313, October 2, 1998] ___ So. 2d ____ (Ala. Crim. App. 1998). On remand, the trial court conducted a hearing at which Shelton was represented by counsel. Shelton testified that he was not informed that he had a right to counsel and that he was not asked whether he wanted to be represented by counsel. He also testified that he was not informed that he could possibly serve time in jail for his conviction. On cross-examination, Shelton stated that he was aware he could be represented by counsel if he "went and paid the money" to hire a lawyer. He stated further that he believed that the trial court would consolidate his case with his son's case and that they would share the same lawyer. The record does not contain evidence that anyone told Shelton that the trial court would appoint a lawyer to represent him if he could not afford one. The prosecutor argued that, although the record did not reflect that anyone informed Shelton of his right to counsel and that he waived his right, Shelton was aware of his right to counsel because he was present when his son, who was

Shelton's codefendant, was informed of his right to counsel and because the trial court warned Shelton throughout the proceedings that he needed a lawyer. The prosecutor stated further that Shelton did a "very good job of representing himself."

Thereafter, trial court entered the following order:

> "1. Although [Shelton] never made a statement on the record specifically waiving his right to counsel, it is the opinion of this Judge that [Shelton] fully understood his right to employ counsel and in fact did a creditable job of defending his own case both at the District and Circuit Court levels.
>
> "2. Repeatedly during the trial of his case, the Court informed [Shelton] about the problems of him representing himself and the fact that he was a lay person would not allow him to circumvent the rules of evidence.
>
> "3. [Shelton] appeared to be an intelligent, articulate, shrewd businessman fully aware of what was going on in the courtroom and aware of the criminal charge against him and the possibilities of punishment (he was found guilty in District Court and received a fine and ordered to pay restitution)."

The trial court does not state in this order that it actually informed Shelton of his right to counsel. The trial court does not state that it informed Shelton that the court would appoint a lawyer to represent him if he could not afford to hire a lawyer.

On return to remand, the Court of Criminal Appeals, citing the United States Supreme Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), held that Shelton did not have a constitutional right to counsel because his sentence was

suspended and he was not actually imprisoned.[3] After the Court of Criminal Appeals overruled Shelton's application for rehearing and denied his Rule 39(k), Ala. R. App. P., motion, he petitioned this Court for a writ of certiorari. We granted Shelton's petition to determine the following: 1) whether Shelton had a constitutional right to counsel even though he was never actually imprisoned; 2) whether Shelton knowingly, intelligently, and voluntarily waived his right to counsel; and 3) whether the trial court denied Shelton his right to a restitution hearing in violation of §15-18-67, Ala. Code 1975.

In concluding, in this second opinion, that Shelton *did not* have a constitutional right to counsel, the Court of Criminal Appeals relied on the following holding of the United States Supreme Court in *Argersinger v. Hamlin*, 407 U.S. at 37-40:

> "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
>
> "....
>
> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

[3] The Court of Criminal Appeals affirmed Shelton's conviction, but remanded for the trial court to conduct a new sentencing hearing and to allow Shelton the right to allocution.

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the [sic] 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."

This *Argersinger* holding necessarily requires a court reviewing a claim of violation of a defendant's right to counsel to determine the existence of the right *retroactively* on the basis of the sentence imposed on the unrepresented defendant.

The defendant in *Argersinger* was convicted, without the aid of counsel, of the misdemeanor offense of carrying a concealed weapon. He was sentenced to 90 days in jail. The Court held that, because the defendant had been imprisoned and had suffered an actual loss of liberty, he was entitled to representation by counsel. The Court did not address the issue of a defendant's right to counsel when no loss of liberty has occurred. *Argersinger*, 407 U.S. at 37.

In another case, *Scott v. Illinois*, *supra*, the United States Supreme Court considered the right to counsel of an indigent defendant who was convicted of shoplifting, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of one year, or by both. The defendant was fined $50, but was not sentenced to any term of imprisonment. In that case, the Court concluded that the defendant was not entitled to appointed counsel:

> "[W]e believe that the central premise of *Argersinger* — that *actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment* — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional

> right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that *no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.*"

440 U.S. at 373. (Emphasis added.)[4]

Neither *Argersinger* nor *Scott* addresses the issue currently before us — whether a suspended or probated sentence to imprisonment constitutes a "term of imprisonment." However, some federal and state courts have interpreted *Argersinger* and *Scott* to mean that a defendant who is convicted, without the aid of counsel, of a misdemeanor offense and is sentenced to a term of imprisonment which is suspended or probated, does not have a right to appointed counsel because the defendant was not "actually imprisoned." *See People v. Reichenbach*, 459 Mich. 109, 587 N.W.2d 1 (1998); *Layton City v. Longcrier*, 943 P.2d 655 (Utah App. 1997); *Griswold v. Commonwealth*, 252 Va. 113, 472 S.E.2d 789 (1996); *State v. Hansen*, 273 Mont. 321, 903 P.2d 194 (1995); *United States v. Smith*, 56 F.3d 66 (6th Cir. 1995); *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991); *United States v. Nash*, 703 F. Supp. 507 (W.D. La.), *aff'd*, 886 F.2d 1312 (5th Cir. 1989); *State v. Sanchez*, 94 N.M. 521, 612 P.2d

[4] The United States Supreme Court expounded further on the requirement that a defendant must be "sentenced to a term of imprisonment" in Nichols v. United States, 511 U.S. 738, 749 (1994), which held that "an uncounseled misdemeanor conviction, *valid under Scott because no prison term was imposed*, is also valid when used to enhance punishment at a subsequent conviction." *Nicholas* overruled *Baldasar v. Illinois*, 446 U.S. 222 (1980), which held that a prior uncounseled misdemeanor conviction, constitutional under *Scott*, could not be used to enhance a second misdemeanor conviction to a felony conviction.

1332 (N.M. App. 1980); and *Cottle v. Wainwright*, 477 F.2d 269 (5th Cir.), *vacated on other grounds*, 414 U.S. 895 (1973).

On the other hand, other courts have held that an indigent defendant who receives a conditionally suspended or probated sentence to imprisonment is entitled to representation by appointed counsel because that defendant has been "sentenced to a term of imprisonment." *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991); *United States v. Foster*, 904 F.2d 20 (9th Cir. 1990); *United States v. Sultani*, 704 F.2d 132 (4th Cir. 1983); *United States v. Leavitt*, 608 F.2d 1290 (9th Cir. 1979); and *United States v. White*, 529 F.2d 1390 (8th Cir. 1976). For example, in *Reilley*, the defendant was charged with leaving property unattended in a national park for longer than 24 hours in an undesignated area, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of six months or by both. The defendant established his indigence and requested appointed counsel, but the trial court denied his request. He was convicted and was sentenced to 30 days' imprisonment, suspended on the condition that he timely pay his $500 fine. In vacating the defendant's 30-day prison sentence, the *Reilley* court reasoned:

> "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid. Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity."

Applying the rationale of *Reilley*, *Argersinger*, and *Scott*, we hold that the defendant in this case was entitled to representation by counsel because he was sentenced to a term of imprisonment, albeit suspended. We do not conclude that a defendant convicted of a petty or misde-

meanor offense can establish a violation of his right to counsel when the defendant *has not been* sentenced to a term of imprisonment. For these reasons, we reverse the holding of the Court of Criminal Appeals that a defendant sentenced to conditionally suspended incarceration for a misdemeanor conviction but not actually incarcerated, does not (retroactively) have a right to counsel. Furthermore, we hold that the Court of Criminal Appeals improperly overruled *Williams v. City of Phenix City*, 659 So. 2d 1004 (Ala. Crim. App. 1995), and *Culberson v. State*, 709 So. 2d 1327 (Ala. Crim. App. 1997), which hold that a conditionally suspended or probated sentence of incarceration cannot be imposed on an indigent defendant who has been denied his right to counsel.[5]

Our inquiry does not end with the determination that Shelton had a right to counsel. We must determine whether the defendant effectively waived his right to counsel in this case. A defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, *unless* the defendant either had counsel or made a knowing, intelligent, and voluntary waiver of his right to counsel. *Argersinger*, 407 U.S. at 37. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). *See Lake v. City of Birmingham*, 390 So. 2d 36 (Ala. Crim. App. 1980). To establish a knowing and intelligent waiver of counsel, "the record at the outset of the trial should establish three factors: 1) that the defendant was informed that he had the right to counsel, 2) that the defendant was informed

[5] We note further that the holding of the Court of Criminal Appeals in *Benson v. City of Sheffield*, 737 So. 2d 1059 (Ala. Crim. App. 1999), is improper for the same reasons stated in this opinion.

that if he could not afford counsel the state would appoint counsel to represent him, and 3) an affirmative showing by the defendant that, understanding these rights, he still elects to proceed without counsel." *Jenkins v. State*, 482 So. 2d 1315, 1317 (Ala. Crim. App. 1985).

The record fails to establish that Shelton "was offered counsel" as required by *Carnley*, *supra*. Likewise the record fails to establish any of the three factors required by *Jenkins*, *supra*. The trial judge's admonitions to Shelton to the effect that he *needed* a lawyer are a far cry from explanations of the right to counsel or offers of appointed counsel if Shelton could not afford to retain counsel. Therefore, we cannot say that Shelton intelligently and understandingly waived his right to counsel.

Shelton claims also that he was denied his right to a restitution hearing pursuant to §15-18-67, Ala. Code 1975. The Court of Criminal Appeals held that Shelton did not preserve this issue for appellate review because he did not object at the original sentencing hearing to the trial court's failure to conduct a restitution hearing. *Perkins v. State*, 715 So. 2d 888, 892 (Ala. Crim. App. 1997); *Dollar v. State*, 687 So. 2d 207, 208 (Ala. Crim. App.), *rev'd on other grounds*, 687 So. 2d 209 (Ala. 1996). We agree. During neither the original sentencing proceedings nor the first remand proceedings did Shelton request a restitution hearing or object to the trial court's failure to conduct a restitution hearing. He did not make any argument that the restitution was not supported by the evidence. *Cf. Ex parte Clare*, 456 So. 2d 357, 359 (Ala. 1984) (holding that defendant's argument regarding the amount of restitution ordered was preserved for appellate review even though defendant did not object during the restitution hearing because defense counsel "made known to the [trial] court his disagreement with the State concerning the amount of restitution"). Shelton did not

present this issue concerning a restitution hearing to the trial court until the commencement of the second remand proceedings. Because Shelton did not timely raise this issue before the trial court for its consideration, this issue has not been properly preserved for our review. Moreover, during the trial, the State presented medical bills showing that the victim owed $516.69 for treatment for injuries he suffered as a result of the assault by Shelton. Shelton had ample opportunity to present evidence to dispute the restitution amount.

Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel, and having found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right, we affirm Shelton's conviction but reverse that aspect of his sentence imposing 30 days of suspended jail time. The remaining aspects of the sentence are affirmed. We remand this cause to the Court of Criminal Appeals for that court to remand with instructions to the trial court to vacate that aspect of Shelton's sentence imposing the suspended jail time.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hooper, C.J., and Houston, Cook, Lyons, and England, JJ., concur.

Maddox, J., dissents.

Brown, J., recuses herself.*

* Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.

MADDOX, Justice (dissenting).

I see no need to reach the question whether Shelton was entitled to counsel in this case because I believe that, even if he had that right, he waived it, as the trial court determined on remand from the Court of Criminal Appeals.

I recognize that, as the main opinion states, "[a] defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, *unless* the defendant either had counsel or made a knowing, intelligent, and voluntary waiver of his right to counsel ." ___ So. 2d at ____. I also agree that we may not presume waiver of this important right from a silent record, *see Carnley v. Cochran*, 369 U.S. 506, 516 (1962), but I respectfully disagree with the proposition that the record in this case is silent as to the question of waiver.

The record shows that the Court of Criminal Appeals had remanded this case for the trial court to determine whether Shelton had intelligently and knowingly waived his right to counsel. At the trial court's hearing on that question, the State argued that during his prosecution Shelton was repeatedly told of his right to counsel and nevertheless chose to represent himself. Based on that argument, the trial court entered an order finding that Shelton had waived his right to counsel.

Under the facts of this case, I am reluctant to question the judgment of the trial court. Furthermore, because the defendant received only a suspended sentence and was not incarcerated, I do not believe that he, in fact, had a right to counsel. Consequently, I respectfully dissent.

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1990031

Released October 27, 2000

Ex parte Lereed Shelton

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Lereed Shelton

v.

State)

(Etowah Circuit Court, CC-97-365; Court of Criminal Appeals, CR-97-1313)

On Application for Rehearing

JOHNSTONE, Justice.

APPLICATION OVERRULED; OPINION MODIFIED [BY SUBSTITUTION OF PAGES 6 AND 7].

Hooper, C.J., and Houston, Cook, Lyons, and England, JJ., concur.

Maddox, J., dissents.

Brown, J., recuses herself.*

*Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.

from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that *no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.*" 440 U.S. at 373. (Emphasis added.)[6]

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[6] The United States Supreme Court expounded further on the requirement that a defendant must be "sentenced to a term of imprisonment" in *Nichols v. United States*, 511 U.S. 738, 749 (1994), which held that "an uncounseled misdemeanor conviction, *valid under Scott because no prison term was imposed*, is also valid when used to enhance punishment at a subsequent conviction." *Nicholas* overruled *Baldasar v. Illinois*, 446 U.S. 222 (1980), which held that a prior uncounseled misdemeanor conviction, constitutional under *Scott*, could not be used to enhance a second misdemeanor conviction to a felony conviction.

Applying *Argersinger* and *Scott* in *Ex parte Reese*, 620 So. 2d 579, 580 (Ala. 1993), this Court recognized that a defendant has a right to counsel in a misdemeanor case in which the defendant receives a jail sentence. This Court held that, because the defendant was sentenced to six months in jail for a prior misdemeanor possession conviction, he was entitled to counsel in that case; and, therefore, without a showing that the defendant either had counsel or waived his right to counsel, that prior conviction could not be used to enhance his current conviction. 620 So. 2d at 581. *Reese* did not address the specific issue of

Neither *Argersinger* nor *Scott* addresses the issue currently before us — whether a suspended or probated sentence to imprisonment constitutes a "term of imprisonment." However, some federal and state courts have interpreted *Argersinger* and *Scott* to mean that a defendant who is convicted, without the aid of counsel, of a misdemeanor offense and is sentenced to a term of imprisonment which is suspended or probated, does not have a right to appointed counsel because the defendant was not "actually imprisoned." *See People v. Reichenbach*, 459 Mich. 109, 587 N.W.2d 1 (1998); *Layton City v. Longcrier*, 943 P.2d 655 (Utah App. 1997); *Griswold v. Commonwealth*, 252 Va. 113, 472 S.E.2d 789 (1996); *State v. Hansen*, 273 Mont. 321, 903 P.2d 194 (1995); *United States v. Smith*, 56 F.3d 66 (6th Cir. 1995); *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991); *United States v. Nash*, 703 F. Supp. 507 (W.D. La.), *aff'd*, 886 F.2d 1312 (5th Cir. 1989); *State v. Sanchez*, 94 N.M. 521, 612 P.2d 1332 (N.M. App. 1980); and *Cottle v. Wainwright*, 477 F.2d 269 (5th Cir.), *vacated on other grounds*, 414 U.S. 895 (1973).

On the other hand, other courts have held that an indigent defendant who receives a conditionally suspended or probated sentence to imprisonment is entitled to representation by appointed counsel because that defendant has been "sentenced to a term of imprisonment." *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991); *United States v. Foster*, 904 F.2d 20 (9th Cir. 1990); *United States v. Sultani*, 704 F.2d 132 (4th Cir. 1983); *United States v. Leavitt*, 608 F.2d 1290 (9th Cir. 1979); and *United States v. White*, 529 F.2d 1390 (8th Cir. 1976). For example, in *Reilley*, the defendant was charged with

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whether a defendant who receives a suspended or probated sentence, but is not actually imprisoned, for a misdemeanor conviction is entitled to counsel.

leaving property unattended in a national park for longer than 24 hours in an undesignated area, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of six months or by both. The defendant established his indigence and requested appointed counsel, but the trial court denied his request. He was convicted and was sentenced to 30 days' imprisonment, suspended on the condition that he timely pay his $500 fine. In vacating the defendant's 30-day prison sentence, the *Reilley* court reasoned:

> "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid. Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity."

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(4)

No. 00-1214

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR PETITIONER

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31 pp

QUESTION PRESENTED

In the light of the "actual imprisonment" standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), refined in *Scott v. Illinois*, 440 U.S. 367 (1979), and reaffirmed in *Nichols v. United States*, 511 U.S. 738 (1994), does the imposition of a suspended or probationary sentence in a misdemeanor case invoke a defendant's Sixth Amendment right to appointed counsel?

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OPINIONS BELOW

The decision of the Alabama Court of Criminal Appeals can be found at *Shelton v. State*, CR-97-1313, 1999 WL 339284 (Ala. Crim. App. May 28, 1999). App. 8–25. The decision of the Alabama Supreme Court is found at *Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000). App. 31–40.

STATEMENT OF JURISDICTION

The decision of the Alabama Supreme Court vacating Shelton's suspended misdemeanor sentence was entered on May 19, 2000. An application for rehearing was denied on October 27, 2000. App. 42–45. The State invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This case arises from the decision of the Alabama Supreme Court to vacate the suspended sentence imposed following LeReed Shelton's conviction for third degree misdemeanor assault based on its conclusion that the receipt of the probationary sentence invoked a Sixth Amendment right to appointed counsel.

On March 21, 1997, LeReed Shelton (Shelton) was adjudged guilty of third degree assault, a misdemeanor offense, then ordered to pay a $500 fine, court costs, and restitution of $333.75, after representing himself in the Etowah County District Court of Alabama. Clerk's Record 2, 12. Shelton appealed the conviction by seeking a trial de novo[1] before a jury in the Etowah County Circuit Court. He then appeared pro se in the circuit court proceedings, where a jury convicted him of the same

[1] Alabama provides a right of appeal from a final judgment of the district court for a trial de novo in the circuit court. Ala. Code § 12-12-71 (1995).

crime. Clerk's Record 2, 12, 15. The trial judge sentenced Shelton to serve thirty days in the Etowah County Detention Center, then suspended the term of imprisonment, imposing two years' unsupervised probation, conditioned on, among other terms, Shelton's payment of court costs, a $500 fine, reparations of $25, and $51.69 in restitution within thirty days. Clerk's Record 16.

Among other issues raised on direct appeal to the Alabama Court of Criminal Appeals, Shelton, through newly retained counsel, asserted that his conviction was void because the trial court had not offered to appoint an attorney for him if he could not afford counsel, and that he had not waived his right to appointed counsel. On October 2, 1998, the Alabama Court of Criminal Appeals declared that "[t]he constitutional right to counsel applies in misdemeanor cases where the appellant's sentence of imprisonment is suspended conditionally" and "remand[ed] the case for the circuit court to determine whether [Shelton] made a knowing, intelligent, and voluntary waiver of his right to counsel." App. 6–7.

On remand, the trial court conducted two hearings, taking evidence from the deputy district attorney, as well as Shelton and his newly retained counsel. Trial Record on Return to Remand 3–46. Following consideration of the arguments and evidence, the judge entered three findings: 1) although Shelton did not explicitly waive his right to counsel, Shelton "understood his right to employ counsel" and "did a credible job of defending his own case"; 2) he cautioned Shelton "[r]epeatedly during the trial" concerning the problems associated with self-representation; and 3) Shelton was "fully aware" of the court proceedings and the implications of trial and imposition of punishment. Clerk's Record on Return to Remand 10–11.

After resubmission of the case, the Alabama Court of Criminal Appeals reversed its previous decision and concluded that a misdemeanor defendant was not constitutionally entitled to appointed counsel upon receipt of a suspended sentence. App. 9–14. In particular, the court reviewed Alabama courts' earlier interpretations of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), and expressly "overrule[d]" certain Alabama cases that "held that [a] conditionally suspended sentence of imprisonment could not be imposed on an indigent defendant who had been denied counsel." App. 10–13.

Accordingly, the court held that "[t]he trial court did not err when it did not conduct an inquiry to determine Shelton's indigence and, had it found Shelton indigent, to advise him of the right to appointed counsel or to determine whether Shelton was affirmatively waiving such a right." App. 14. Nevertheless, the court remanded the case to "ensure that Shelton was afforded allocution." App. 21–23, 25.

While on remand, "in an abundance of caution," the Etowah County Circuit Court "reopened the sentence hearing to allow [Shelton] further allocution[.]" App. 26. At the conclusion of the proceeding, the trial judge imposed the same sentence involving the payment of fines and the suspension of Shelton's thirty-day jail sentence. App. 26. On the second return to remand, the Alabama Court of Criminal Appeals affirmed the sentence imposed by the lower court. App. 28–29. Shelton, through retained counsel, filed an application for rehearing, which was denied on September 24, 1999. App. 30.

Shelton then filed a petition for writ of certiorari in the Alabama Supreme Court, which was granted on

December 13, 1999. In a 6-to-1 decision,[2] the court affirmed Shelton's misdemeanor conviction and "[t]he remaining aspects of the sentence[,]" but "revers[ed] that aspect of his sentence imposing 30 days of suspended jail time." App. 40. The court observed that "[o]n cross-examination, Shelton stated that he was aware he could be represented by counsel if he 'went and paid the money' to hire a lawyer." App. 32. However, the court concluded that "[t]he record does not contain evidence that anyone told Shelton that the trial court would appoint a lawyer to represent him if he could not afford one." App. 32.

The Supreme Court of Alabama then examined this Court's decisions in *Argersinger* and *Scott*. The court below acknowledged that the *Argersinger* Court held that the Sixth Amendment right to appointed counsel turned on "the actual deprivation of a person's liberty," but concluded that this decision "did not address the issue of a defendant's right to counsel when no loss of liberty has occurred." App. 34–35. The Alabama Supreme Court further recognized that *Scott* reconfirmed *Argersinger*'s "central premise," — i.e., "that actual imprisonment is a penalty different in kind from fines of the mere threat of imprisonment," App. 35, but concluded that *Scott* too was not controlling with respect to suspended sentences. App. 36.

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[2] Justice Johnstone wrote the majority opinion vacating Shelton's suspended thirty-day sentence, with Justices Hooper, Houston, Cook, Lyons, and England concurring. Justice Maddox dissented, reasoning that "because [Shelton] received only a suspended sentence and was not incarcerated, [he] [did] not believe that [Shelton], in fact, had a right to counsel." Justice Brown recused because she was a member of the Court of Criminal Appeals when that court reviewed Shelton's case.

Finding that "[n]either *Argersinger* nor *Scott* addressed the issue . . . whether a suspended or probated sentence to imprisonment constitutes a 'term of imprisonment,' " the Alabama Supreme Court considered conflicting federal and state decisions involving the issue. App. 36–37. Relying on the reasoning employed in *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991), the Alabama Supreme Court concluded that a conditional threat of imprisonment imposed in an uncounseled misdemeanor case "could never be carried out" and thus, was "invalid" as a matter of federal constitutional law. Pointing to language in *Scott*, 440 U.S. at 374 (emphasis added), that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment" absent the assistance of counsel, the Alabama Supreme Court ruled Shelton "was entitled to representation by counsel because he was sentenced to a term of imprisonment, albeit suspended." App. 37.

Accordingly, the Alabama Supreme Court held that the Court of Criminal Appeals had "improperly overruled" earlier decisions of that same court "which hold that a conditionally suspended or probated sentence of incarceration cannot be imposed on an indigent defendant who has been denied his right to appointed counsel." App. 38. Ruling "that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel," and discovering no evidence in the record that Shelton " 'was offered counsel[,]' " the court "found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right . . . [and] reverse[d] that aspect of his sentence imposing 30 days of suspended jail time." App. 40. By reversing Shelton's suspended sentence, the court correspondingly vacated the two-year probationary term.

The State filed an application for rehearing in the Alabama Supreme Court asserting that the conditional nature of Shelton's probated sentence did not satisfy the "actual imprisonment" standard of *Scott v. Illinois*, 440 U.S. 367 (1979), and thus that Shelton had no right to State-appointed counsel. The Alabama Supreme Court denied the State's application on October 27, 2000. App. 42.[3]

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[3] The Alabama Supreme Court slightly modified its original opinion on rehearing by including additional commentary in its second footnote.

SUMMARY OF THE ARGUMENT

Although the Sixth Amendment guarantees "the assistance of counsel . . . [i]n all criminal prosecutions," that constitutional protection extends the State's obligation to provide counsel only in those misdemeanor cases involving actual incarceration. This Court established that standard in *Argersinger v. Hamlin*, 407 U.S. 25, 33, 38 (1972), by requiring appointed counsel only where prosecution "actually [led] to imprisonment" or "imprisonment actually occur[red]." This Court has twice refined that principle. First, this Court distinguished between "actual imprisonment" — which invokes the right to appointed counsel — and "fines or the mere threat of imprisonment" in *Scott v. Illinois*, 440 U.S. 367, 373 (1979). Then, in *Nichols v. United States*, 511 U.S. 738, 746 (1994), this Court declared that appointed counsel is needed only where a conviction "result[s] in imprisonment." Shelton, who received a probationary sentence, remained at liberty, subject to a possibility of imprisonment only upon noncompliance with the terms of his release. Because Shelton faced only the "threat" of incarceration, he had no right to appointed counsel during the trial of his misdemeanor case.

Notwithstanding the distinction drawn between "actual imprisonment" and the "mere threat" of incarceration in *Argersinger*, *Scott*, and *Nichols*, the Alabama Supreme Court concluded that imposition of a suspended or probationary sentence in a misdemeanor case triggers the right to counsel. This interpretation contravenes the construction given the Sixth Amendment by this Court in *Scott* and the majority of federal appeals and state supreme courts that have addressed the issue. Accordingly, this Court should reverse and reinstate Shelton's probationary sentence.

ARGUMENT

SHELTON'S RECEIPT OF A SUSPENDED SENTENCE IN HIS MISDEMEANOR CASE WAS A "MERE THREAT OF IMPRISONMENT" UNDER *SCOTT V. ILLINOIS* AND DID NOT INVOKE HIS SIXTH AMENDMENT RIGHT TO APPOINTED COUNSEL.

Under the Sixth Amendment, the right to state-appointed counsel extends only to those cases involving actual incarceration. That conclusion is the product of three decisions. Initially, in *Argersinger v. Hamlin*, 407 U.S. 25, 33, 38 (1972), this Court found that counsel was required only where "imprisonment actually occur[red]." This Court refined that principle in *Scott v. Illinois*, 440 U.S. 367, 373 (1979), by differentiating between "actual imprisonment" and "fines or the mere threat of imprisonment." Finally, this Court affirmed the distinction drawn in *Scott* by recognizing in *Nichols v. United States*, 511 U.S. 738, 746 (1994), that only "criminal proceedings that result[] in imprisonment" invoke the right to counsel. Shelton remained at liberty under his probationary sentence, subject to a possibility of imprisonment only upon violation of the terms of his release. Therefore, because Shelton faced only the "threat" of incarceration, but was not actually imprisoned, he had no right to counsel during the trial of his misdemeanor case.

A. This Court Has Interpreted the Sixth Amendment to Extend Misdemeanor Defendants the Right to Appointed Counsel Only When They Are Actually Imprisoned.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right

. . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. When "originally drafted," this provision accorded only a right to retained counsel in federal criminal proceedings. *Powell v. Alabama*, 287 U.S. 45, 68 (1932) ("Historically [a hearing] . . . has always included the right to the aid of counsel when desired and provided by the party asserting the right."); *Scott*, 440 U.S. at 370 (the Sixth Amendment "contemplated [only] . . . the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense"). Despite the limited original purpose of the Sixth Amendment, this Court extended the right to include appointed counsel for indigent felony defendants. *Powell*, 287 U.S. at 71 (defendants charged in 1931 with capital crime who "stood in deadly peril of their lives" and were "unable to employ counsel" entitled to protection under Sixth Amendment); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (right to appointed counsel for federal felony defendants facing loss of "life or liberty"); *Gideon v. Wainwright*, 372 U.S. 335, 340–45 (1963) (Sixth Amendment right to appointed counsel extended through Fourteenth Amendment to state felony prosecution where defendant faced five years in state prison).

In the application of the Sixth Amendment to misdemeanors, this Court first focused on an individual's "deprivation of liberty" absent the advice and guidance of counsel in *Argersinger*, 407 U.S. at 32–34. Argersinger, charged in Florida with carrying a concealed weapon, faced a punishment of imprisonment up to six months, a $1,000 fine, or both. *Id.* at 26. Following a bench trial, Argersinger was sentenced to serve 90 days in jail. *Id.* Argersinger contested his uncounseled conviction in a state habeas corpus petition, alleging that he was deprived of his right to counsel. *Id.* The Florida Supreme Court denied Argerainger relief, concluding that the right to appointed counsel extended only to trials involving

"non-petty offenses punishable by more than six months imprisonment." *Id.* After granting certiorari, this Court rejected the Florida "six-month" standard and ruled that, because Argersinger "was in fact sentenced to jail," he was entitled to the assistance of appointed counsel. *Id.* at 37.

This Court, however, rejected the broader arguments of Argersinger and the Legal Aid Society of New York, as amicus curiae, that appointment of counsel was required whenever "imprisonment was an authorized penalty." *Scott*, 440 U.S. at 373 n.4. Drawing a bright line, this Court established that the right to appointed counsel applies only where prosecution "actually [led] to imprisonment" or "imprisonment actually occur[red]." *Argersinger*, 407 U.S. at 33, 38.

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.
>
> *The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty*, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy.

Id. at 40 (emphasis added).

Unwilling to "extrapolate" or further "depart[] from the literal meaning of the Sixth Amendment" as construed in *Argersinger*, this Court, seven years later in *Scott*, refused to extend the right to appointed counsel to

cases where imprisonment was an "authorized" penalty for a misdemeanor crime. *Scott*, 440 U.S. at 372. Scott faced a $500 fine, one year in jail, or both, for his Illinois shoplifting crime, but ultimately received only a fine upon conviction. *Id.* at 368. Appealing his uncounseled conviction to the Illinois Supreme Court, Scott contended that this Court's decisions, "culminating in *Argersinger v. Hamlin*[,] . . . require[d] state provision of counsel whenever imprisonment [was] an authorized penalty." *Id.* The state supreme court rejected Scott's argument and refused to extend *Argersinger* to cases where imprisonment was merely an authorized statutory punishment. This Court agreed and held that the Sixth and Fourteenth Amendments "require[d] only that no indigent criminal defendant be sentenced to a term of imprisonment unless . . . afforded . . . the right to assistance of appointed counsel[.]" *Id.* at 374. This Court differentiated between cases resulting in "actual imprisonment" — which required Sixth Amendment protection — from those involving only "fines or the mere threat of imprisonment."

> *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. . . . [T]he central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.

Scott, 440 U.S. at 373.

Fifteen years later, this Court reaffirmed *Scott* in *Nichols* by applying the "actual imprisonment" standard to permit use of an uncounseled misdemeanor conviction to enhance punishment in a later case. *Nichols*, 511 U.S.

at 746–47. In 1983, Nichols was convicted in Georgia for misdemeanor driving under the influence; although he faced a maximum punishment of a one-year imprisonment and a $1,000 fine, the state court imposed only a $250 fine. *Id.* at 740 & n.1. Seven years later, when Nichols pleaded guilty to possession of cocaine with intent to distribute, the United States District Court for the Eastern District of Tennessee relied on the 1983 crime to add a criminal history point to Nichols's total sentencing score under the United States Sentencing Commission's Guidelines. *Id.* at 740. Nichols objected to the use of the misdemeanor conviction for enhancement on the ground that, in violation of the Sixth Amendment, he was not represented by counsel. Both the district court and Sixth Circuit held that Nichols's constitutional rights were not violated by use of the prior conviction. *Id.* at 741–42.

"[A]dher[ing] to *Scott v. Illinois*[,]" this Court held that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, [was] also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748–49. Reviewing the difference between the application of the Sixth Amendment to felonies and misdemeanors,[4] this Court reiterated its earlier conclusion that "the language of the Sixth Amendment . . . had [been] expanded . . . well beyond its obvious meaning" and emphasized that *Scott* drew "the line . . . [for Sixth Amendment protection of misdemeanor defendants] between criminal proceedings that resulted in imprisonment, and those that did not." *Id.* at 746.

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[4] While discussing *Scott*, this Court "contrast[ed]" between misdemeanor and felony cases, noting that, only in the latter did "the Constitution require that an indigent defendant be offered appointed counsel unless that right [was] intelligently and competently waived." *Nichols*, 511 U.S. at 743 n.9.

Consistent with *Scott* and *Nichols*, this Court, in decisions involving the right to counsel for termination of parental rights, has reiterated that the loss of physical liberty triggers Sixth Amendment protections. *Lassiter v. Department of Social Services of Durham Co.*, 452 U.S. 18, 25–26 (1981) ("the defendant's interest in personal freedom . . . triggers the right to appointed counsel"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996) ("In criminal prosecutions that do not lead to the defendant's incarceration . . . our precedent recognizes no right to appointed counsel.").

The Alabama Supreme Court's ruling erroneously expanded this Court's application of the Sixth Amendment in *Argersinger*, *Scott*, and *Nichols*. *Cf.*, *Arkansas v. Sullivan*, 121 S. Ct. 1876, 1878 (2001) ("while 'a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them"). By focusing on language in *Scott* that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment" absent assistance of counsel, 440 U.S. at 374, the Alabama Supreme Court overlooked the demarcation of "actual imprisonment" — judged at the time of final disposition — as the benchmark triggering the right to counsel in *Argersinger*, *Scott* and *Nichols*. In including only those convictions where "imprisonment actually occur[red]" in *Argersinger*, 407 U.S. at 38, and adopting an "actual imprisonment" standard over a "mere threat" of incarceration inquiry in *Scott*, 440 U.S. at 373, this Court limited Sixth Amendment protection to situations where an indigent misdemeanor defendant suffered a physical loss of liberty. Refining *Scott* in *Nichols*, this Court emphasized the right to counsel only extended to "criminal proceedings that

resulted in imprisonment[.]" 511 U.S. at 746 (emphasis added). When considered collectively, and in the context of this Court's expressed aversion to enlargement of the Sixth Amendment in *Scott*, 440 U.S. at 372, these cases mandate appointed counsel only when the indigent misdemeanor defendant is imprisoned for his crime.

The Etowah County Circuit Court exercised its discretionary authority to suspend Shelton's thirty-day jail sentence and released him on probation.[5] Shelton was not "actual[ly] imprison[ed]"; instead, he faced only the "threat" of imprisonment, which did not warrant appointment of counsel. Accordingly, under *Argersinger*, *Scott*, and *Nichols*, Shelton was not entitled to appointed counsel.

B. The Majority of Federal Appeals and State Supreme Courts Have Ruled That a Suspended or Conditional Sentence Does Not Trigger a Misdemeanor Defendant's Right to Appointed Counsel Under the Sixth Amendment.

Before *Scott*'s release, the Fifth Circuit Court of Appeals discerned that the Supreme Court required actual confinement to invoke the protections of counsel in a misdemeanor case. *Cottle v. Wainwright*, 477 F.2d 269, 275 (5th Cir. 1973), *vacated on different grounds*, 414 U.S. 895 (1973). In *Cottle*, the Fifth Circuit affirmed the

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[5] To utilize the tool of probation, Alabama circuit courts must initially suspend a sentence of imprisonment. Excepting convicts "whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years[,] . . . [c]ircuit courts and district courts . . . may suspend execution of [a] sentence and place on probation any person convicted of a crime in any court exercising criminal jurisdiction.." Ala. Code § 15-22-50 (1995).

Florida Parole Commission's use of an uncounseled misdemeanor conviction that had resulted in a twenty-day suspended sentence to revoke parole following commission of a second parole violation. Building on the statements in *Argersinger* that appointed counsel was only required when a misdemeanor conviction "end[ed] up in the actual deprivation of a person's liberty," 407 U.S. at 40, the court upheld the validity of the uncounseled conviction, ruling that a suspended sentence was not tantamount to "actual imprisonment."[6] *Cottle*, 477 F.2d at 275.

The Second, Fourth, Sixth, and Eleventh Circuits agreed with *Cottle*'s rationale that probationary and suspended sentences do not invoke the right to appointed counsel. In *United States v. Castro-Vega*, 945 F.2d 496, 499–500 (2d Cir. 1991), *cert. denied*, 507 U.S. 908 (1993), the Second Circuit held that, because "no Sixth Amendment right to counsel" attached upon receipt of a probationary sentence, an uncounseled conviction could be used to increase the defendant's criminal history level. Similarly, the Fourth Circuit, in *United States v. Jackson*, 605 F.2d 1319, 1320 (4th Cir. 1979), ruled that a probationary sentence imposed for assault was not "actual imprisonment" under *Scott* and did not create a "constitutional right to court-appointed counsel."[7]

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[6] *Cottle*'s validity was called into question in *Potts v. Estelle*, 529 F.2d 450, 453-54 (5th Cir. 1976), where the court interpreted *Argersinger* to preclude subsequent use of uncounseled misdemeanors. After the release of *Scott v. Illinois*, however, the Fifth Circuit revived *Cottle* by ruling that an uncounseled misdemeanor, absent imposition of a jail sentence, was "valid for all purposes" — in that case, for impeachment. *Griffin v. Blackburn*, 594 F.2d 1044, 1045-46 (5th Cir. 1979).

[7] In dicta in a subsequent decision, the Fourth Circuit, while "declin[ing] to decide if the right to counsel attaches when a suspended jail sentence is imposed" noted that, because, upon violation, the probation could not be revoked and an active sentence imposed, "the magistrates in this circuit should not impose even a suspended jail sentence in any case in which an unrepresented defendant has declined to waive his right to counsel." *United States v. Sultani*, 704 F.2d 132, 133-34 (4th Cir. 1983).

Following the same reasoning, the Sixth Circuit in *United States v. Milligan*, No. 96-5330, 96-5439, 1999 WL 313881, at *3 (6th Cir. May 3, 1999) (unpublished opinion), found that a suspended sentence imposed for an uncounseled misdemeanor weapons possession charge was not a "term of imprisonment" under *Scott* and was properly used by a federal district court to assess one criminal history point in calculating the defendant's criminal history category for a subsequent drug conviction. The Eleventh Circuit, in following *Scott* and adopting Fifth Circuit precedent,[8] joined the Second, Fourth, Fifth, and Sixth Circuits in validating uncounseled misdemeanors that result in a suspended or probationary sentence. *United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988) (uncounseled misdemeanor convictions may be used for enhancement "where defendant was not imprisoned").

Relying on the *Scott* differentiation between "actual imprisonment" and the "mere threat" of incarceration, numerous state supreme courts have also reasoned that a suspended or probated sentence does not create a right to assistance of counsel. *Parks v. McClung*, 524 S.E.2d 718, 720 (Ga. 1999) (in discussing the right to revoke probation, the Georgia state supreme court adopted appellate court precedent holding that "[w]here a

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[8] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the United States Court of Appeals for the Eleventh Circuit held that "the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981 . . . shall be binding precedent in the Eleventh Circuit."

defendant is given a conditional, probated sentence, he is not entitled to court-appointed counsel!"); *People v. Reichenbach*, 587 N.W.2d 1, 16 (Mich. 1998) ("The plain meaning of the words 'actual imprisonment' as well as the words 'mere threat of imprisonment' dictate the conclusion that defendant's conditional sentence did not constitute 'actual imprisonment.' "); *Griswold v. Commonwealth*, 472 S.E.2d 789, 791 (Va. 1996) (a thirty-day suspended sentence did not equate to the "actual imprisonment" established in *Scott* and *Nichols* as requiring appointment of counsel); *State v. Hansen*, 903 P.2d 194, 197 (Mont. 1995) ("the imprisonment must be *actual*; a threat of imprisonment (such as a suspended sentence) is not enough to create a constitutional right to counsel") (emphasis in original); *Commonwealth v. Thomas*, 507 A.2d 57, 59 n.7 (Pa. 1986) (co-defendant's probationary sentence, notwithstanding the "threat" of subsequent revocation, did not entitle her to assistance of counsel). Many state appellate courts agree with this interpretation. *Barnes v. State*, No. A01A0624, 2001 WL 540764, at *1 (Ga. Ct. App. May 23, 2001) ("a '12-month probated sentence' . . . and a '12-month suspended period of confinement' . . . were not sentences of actual imprisonment triggering the right to counsel"); *People v. MacArthur*, 731 N.E.2d 883, 886–90 (Ill. App. Ct. 2000) (defendant not entitled to counsel when one-year conditional discharge imposed because "actual imprisonment is a punishment so different in kind from lesser penalties that the constitutional right to counsel protects only against uncounseled convictions that actually result in imprisonment"); *West Valley City v. Sellers*, No. 990472-CA, 1999 WL 33244766, at *1 (Utah Ct. App. Sept. 2, 1999) (suspended sentence imposed for speeding, a class C misdemeanor, did not "deprive[] [defendant] of his liberty" such that he was entitled to appointed counsel); *Holmes v. State*, 740 So. 2d 952, 961 (Miss. Ct. App. 1999) (forty-eight-hour suspended

sentence did not result in incarceration and could be used, under *Nichols*, to enhance punishment in a subsequent case); *State v. Rau*, 465 S.E.2d 370, 387–88 (S.C. Ct. App. 1995) (thirty-day jail sentence, suspended upon payment of a fine, where fine paid, did not create a constitutional right to appointed counsel); *Hlad v. State*, 565 So. 2d 762, 766–67 & n.1 (Fla. Dist. Ct. App. 1990) (interpreting "imprisonment" to entail "confinement in a jail or state penitentiary," defendant's five-year probationary term did not create a right to appointed counsel under *Scott* and could be used to enhance fourth DUI offense from misdemeanor to felony), *aff'd*, 585 So. 2d 928 (Fla. 1991); *City of Akron v. Bilder*, No. 14363, 1990 WL 67055, at *1 (Ohio Ct. App. May 16, 1990) (no attorney was required on resentencing when the original jail term was suspended) (unpublished opinion); *State v. Sweeney*, 464 A.2d 1150, 1151–52 (N.J. Super. Ct. App. Div. 1983) (imposition of one-year probationary term did not create a right to counsel, thus making an uncounseled misdemeanor valid for enhancing the sentence of a second DUI offense); *Campa v. Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) (because revocation of a probationary term is "speculative," and prosecutor and city magistrate agreed no jail time would be imposed, the defendant was not entitled to counsel during trial).

"[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Lassiter*, 452 U.S. at 25. That interest corresponds with the legal implications inherent upon receipt of a conditional sentence. Imprisonment itself involves physical confinement, whereas, a probated or suspended sentence permits emancipation in lieu of incarceration, subject to a threat of imprisonment implemented only if the misdemeanor defendant fails to fulfill the terms of

release. *Black's Law Dictionary* 760, 1220, 1367, 1368 (7th ed. 1999) (defining "imprisonment," "probation," and "conditional" and "suspended" sentences). "Were it the case that probation or conditional sentences constitute 'actual imprisonment' because of the judicial threat of imprisonment, nearly every misdemeanor sentence would be within the scope of 'actual imprisonment.' " *Reichenbach*, 587 N.W.2d at 7. Language in *Argersinger* cautions that "[t]he run of misdemeanors [would] not be affected" under its "actual deprivation" standard. 407 U.S. at 40. This principle, combined with the dismissal of a need for appointed counsel in *Scott* when faced with a "mere threat of imprisonment," and the recognition in *Nichols* that counsel is needed only when a conviction "result[s] in imprisonment," confirms the *Reichenbach* court's conclusion and supports the majority of federal appeals and state supreme courts that agree with this reasoning. *Scott*, 440 U.S. at 373; *Nichols*, 511 U.S. at 746.

C. If the *Scott* "Actual Imprisonment" Standard Was Interpreted to Require Appointment of Counsel When Suspended or Conditional Sentences Were Imposed, it Would Divert Scarce Judicial Resources.

The incremental benefit of providing counsel in situations where only the "threat" of imprisonment exists does not outweigh the strain that would be imposed on scarce governmental and judicial resources. *Argersinger*, 407 U.S. at 49 ("[w]here the possibility of a jail sentence is remote . . . the costs of assistance of counsel may exceed the benefits") (Powell & Rehnquist, JJ., concurring). States and courts would incur additional expenses in compensating defense counsel and supplying additional judicial resources, such as extra courtroom time and court

reporters. Moreover, such a rule would "favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a minor petty-offense case would be a luxury the family could not afford." *Id.* at 50.

Concomitantly, trial courts' abilities to adjudicate "minor" offenses efficiently and equitably would be thwarted by the escalating delay and congestion. *Id.* at 59 (pressures on obtaining counsel and diverting other resources would be "likely to result in the stretching out of the process with consequent increased costs to the public and added delay and congestion in the courts"). Inundated with inevitable "overlawyering" of minor cases, the courts and the public would suffer the unnecessary effects of a "stretching out of the process[.]" *Id.*

Resources would be further exhausted in reviewing innumerable cases where an uncounseled misdemeanor conviction resulting in a suspended or conditional sentence was used, under *Nichols*, to increase the penalty for a subsequent crime. Diverting money and time to resolve misdemeanor offenses and reexamine the use of uncounseled convictions for enhancement purposes would drain local and state courts, thereby depleting the limited judicial resources available to adjudicate felony and especially capital cases. Finally, successful challenges would emasculate anti-recidivism statutes and their underlying policies t[illegible]afeguard the public and deter future crime.

The "actual imprisonment" language employed in *Scott* and *Nichols* "is clear. Nowhere does [this] Court limit its holding to those misdemeanor convictions resulting in fines. Logically speaking, the 'mere threat of imprisonment' can only be read to include suspended sentences." *United States v. Smith*, No. 94-5627, 1995 WL 314892, at *2 (6th Cir. May 23, 1995) (unpublished

opinion). A suspended sentence, under which Shelton did not face a loss of liberty, fell within the "threat" category identified in *Scott*. In such circumstances, Shelton's "interest in personal liberty [was] diminish[ed], [therefore,] so [was] his right to appointed counsel." *Lassiter*, 452 U.S. at 26. The Alabama Supreme Court ignored these principles and erroneously concluded that Shelton's prospect of imprisonment invoked the right to counsel. Because that decision conflicts with this Court's decisions in *Argersinger*, *Scott*, and *Nichols*, and with the decisions of a majority of federal appeals and state supreme courts that have considered this issue, this Court should apply the "actual imprisonment" standard and rule that Shelton's suspended jail term did not invoke the Sixth Amendment right to counsel.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

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Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

vs.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF OF RESPONDENT

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CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment provides:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process or law; nor deny any person within its jurisdiction the equal protection of the laws.

SUMMARY OF THE ARGUMENT

I. Before a defendant can receive a suspended sentence and probation under the law of Alabama and some other jurisdictions judgment and sentence must first be imposed. The judgment and sentence remain in effect in spite of the subsequent suspension of the sentence and probation. A suspended sentence after conviction is different from, and more onerous than, a pre-trial threat of imprisonment from a mere accusation before there is a conviction. Incarceration will follow if probation is revoked. A convicted defendant who receives a jail sentence which is suspended is sentenced to a term of imprisonment within the meaning of *Scott vs. Illinois*. Consequently, the Sixth Amendment right to counsel applies.

II. The Sixth Amendment right to counsel, as applied in *Argersinger vs. Hamlin* and *Scott vs. Illinois*, operates to prevent a deprivation of a person's liberty by insuring a fair trial in misdemeanor prosecutions. This protection applies to all State ordered deprivations of liberty. It is not confined to protection against physical restraint, which is only one form of deprivation of liberty. The imposition of a suspended sentence and probation following conviction of a crime, even if only for a misdemeanor, imposes upon a defendant onerous burdens which deprive a person of liberty. Restraints on many recognized liberties, including the rights to free speech, travel, association, employment of choice, and privacy, are universally recognized as proper conditions of probation. Since the sanction of probation is inherently a deprivation of liberty, the Sixth Amendment right to counsel should apply in cases where a defendant's liberty is deprived by a suspended sentence and probation the same as it applies where a defendant's liberty is deprived by a sentence of immediate incarceration.

III. A misdemeanant who receives a suspended sentence and probation is subject to having the probation revoked. Revocation of probation can, and usually does, result in incarceration. A probationer who is revoked and incarcerated suffers actual imprisonment. If an uncounseled misdemeanant can be sentenced to a suspended sentence and probation, and then revoked and incarcerated, the result is no different from that of an uncounseled misdemeanant who is convicted and immediately incarcerated. Both suffer actual imprisonment from an uncounseled conviction.

A substantial percentage of misdemeanor probationers are revoked and incarcerated. No rational basis exists for a distinction in the application of the Sixth Amendment's right of counsel to misdemeanants who are immediately incarcerated and those whose incarceration is delayed by a suspended sentence and probation that is subsequently revoked. To prevent this disparity in the benefit of Sixth Amendment rights the same rule with respect to right of counsel should apply to defendants convicted of misdemeanors and given suspended sentences and probation as applies to misdemeanants sentenced to immediate terms of incarceration.

IV. *Argersinger vs. Hamlin* and *Scott vs. Illinois* should be overruled to the extent that they do not extend the Sixth Amendment's right to counsel to all cases where a sentence of imprisonment is an authorized penalty. The effect of these decisions is to require an awkward and ethically questionable pre-judging by a trial judge of the factors which determine the degree and nature of the penalty for a misdemeanor conviction. Such a pre-judging necessarily detracts from the ability of a trial judge, who is usually the trier of fact in misdemeanor cases, to be an impartial trier of facts because making the assessments required by *Argersinger* means that the trial judge must acquire information in advance of trial about the nature of the defendant's conduct and the defendant's past record. Also, the practice of deciding in advance of trial about the bounds of punishment denies a trial judge the power to exercise judicial discretion in determining the degree of punishment appropriate for a particular offense after hearing the trial evidence regarding that offense. A more workable and consistent practice, which

would assure that no uncounseled defendants would be incarcerated, is to require counsel in all cases where a jail sentence is an authorized penalty.

V. Assuring a fair trial in criminal prosecutions has a financial cost. To assure that the adversary judicial system produces a fair result the public must bear that financial burden. The financial burden of providing counsel in misdemeanor prosecutions where a jail sentence is an authorized penalty has not proven to be intolerable. A great majority of the States now provide this service, which is a fair indication that the remaining States can also tolerate the additional cost this will entail.

ARGUMENT

Basing their position on *Argersinger vs. Hamlin*, 407 U.S. 25 (1972), *Scott vs. Illinois*, 440 U.S. 367 (1979), and *Nichols vs. United States*, 511 U.S. 738 (1994), the Petitioner and Amici aligned with it argue that the right of counsel guaranteed by the Sixth Amendment[1] does not apply to a person convicted of a misdemeanor and sentenced to a jail term which is subsequently suspended on the condition of probation. The Respondent submits that this position is (1) not supported by the *Argersinger*, *Scott*, and *Nichols* decisions, (2) will accomplish results that are

[1] The right of counsel when refered to in this brief will refer to the right of every defendant to be informed of this right as well as the right of indigents to appointed counsel. See *Carnley vs. Cochran*, 369 U.S. 506, 516-17 (1962).

inimical to *Argersinger* and *Scott*, and (3) is contrary to principles firmly established by this Court.

I. A SUSPENDED SENTENCE IS A SENTENCE TO A TERM OF IMPRISONMENT, NOT MERELY A THREAT OF IMPRISONMENT, WITHIN THE MEANING OF *SCOTT VS. ILLINOIS*.

The argument that a jail sentence for a misdemeanor which is subsequently suspended on the condition of probation is merely a threat of imprisonment, and not a sentence to a term of imprisonment which invokes the Sixth Amendment right to counsel described in *Scott vs. Illinois* and *Argersinger vs. Hamlin*, is grounded on a superficial analysis of those decisions which takes a restricted view of their rationale and stresses a literal reading of the term "actual imprisonment". This analysis also overlooks the procedure by which a defendant receives a suspended sentence and probation under Alabama law (and the law of other jurisdictions) and overlooks the full significance of a suspended sentence and probation following an adjudication of guilt.

Under Alabama law a court, upon a determination of guilt, must pronounce judgment against and sentence the defendant. See Ala.R.Crim.P. 26.2. It is only after judgment has been entered and a sentence imposed (which means a sentence of confinement if that is the sentence suspended) that a court is authorized to suspend the sentence and place the defendant on probation. See ALA.CODE § 15-22-50 (1975); Ala.R.Crim.P. App., Form 99 (" . . . has been convicted of ___ and has been sentenced to ___. It is hereby ordered that said sentence is

hereby suspended, and the defendant is placed on probation . . . ".). That was the procedure followed in Petitioner's case in the Alabama court (App.26). The laws of other jurisdictions establish similar procedures. See, e.g., GA. CODE ANN. § 17-10-1(a)(1) (1997); IND. CODE § 35-38-2.6-3 (1976); MASS. ANN. LAWS ch. 279 §§ 1, 1A (1991); MISS. CODE ANN. § 47-7-33 (1972); OHIO REV. CODE ANN. § 2929.51 (Baldwin 1953); OKLA. STAT. tit. 22, § 991(a) (1992); TENN. CODE ANN. §§ 40-20-101, 203, 210; § 40-35-303 (1955).

Under Alabama law the suspension of a sentence and the grant of probation does not operate to alter or set aside the judgment and sentence. Even with a suspension of the sentence and a grant of probation the judgment and sentence remain in full force and effect, and the defendant receives no credit on the suspended sentence for time served on probation if probation is revoked. See *Wray vs. State*, 472 So.2d 1119, 1121 (Ala. 1985); *Ex Parte Hutchison*, 264 Ala. 447, 87 So.2d 847, 850 (1956); *Hamilton vs. State*, 43 Ala. App. 192, 186 So.2d 108, 114 (1965); *Persall vs. State*, 31 Ala. App. 309, 16 So.2d 332, 334 (1944). The suspended sentence can be converted into incarceration by merely revoking probation.

The concept that a sentence though suspended remains a sentence to imprisonment has been recognized by a decision of this Court (which was rendered at a time when federal sentencing procedures were more like the present Alabama procedure). See *Roberts vs. United States*, 320 U.S. 264, 266 (1943) ("Neither probation nor suspension of execution rescinded the judgment sentencing petitioner to imprisonment . . . "). Other State courts have made similar pronouncements. See, e.g., *Sutton vs. State*,

191 N.E.2d 104, 106 (Ind. 1963); *State vs. Adape*, 14 Kan. App. 2d 521, 794 P.2d 672, 676 (1990); *Lyda vs. State*, 428 P.2d 347 (Okla. Crim. App. 1967). The concept under Alabama law is that a suspended sentence is still a sentence of imprisonment the probationer is merely serving outside the prison walls. See *Persall vs. State, supra*. The same idea was described by this Court in *Morrissey vs. Brewer*, 408 U.S. 471, 477 (1972) where parole, a similar arrangement to probation with a suspended sentence, was referred to as a "variation on imprisonment."

Consequently, if we give full meaning to the words of the penultimate sentence of the majority opinion in the *Scott* case[2], sentencing under Alabama law to a jail term with a subsequent suspension of the sentence on the condition of probation is a sentence to a term of imprisonment.

Petitioner's argument that the *Scott* and *Nichols* cases make a distinction between incarceration and a mere "threat of incarceration" fails to appreciate the fact that the comparison referred to in those cases was in a different context. The threat of incarceration referred to in *Scott* and *Nichols* is the pre-trial potential of incarceration allowed by law for the offense charged *if* the defendant is convicted. There is a vast difference between the threat of incarceration facing an accused, who is presumed innocent, and what faces a defendant already convicted and

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[2] " . . . [T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant *be sentenced to a term of imprisonment* unless the State has afforded him the right to assistance of appointed counsel in his defense." (Emphasis added).

under a suspended sentence. The "if convicted" condition has been removed. Only probation revocation (a subject more fully discussed in Part III of this brief), which is a thin reed as compared to the "if convicted" status, stands between the defendant and incarceration. The argument which seeks to equate the pre-trial threat and the post-conviction threat of incarceration should be rejected.

Well reasoned decisions of the Sixth Circuit, the Tenth Circuit, and the Supreme Court of Vermont have reached the conclusion that a suspended sentence is a sentence of imprisonment which invokes the right to counsel. See *United States vs. White*, 529 F.2d 1390, 1394 (8th Cir. 1976); *United States vs. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) ("If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid"); *State vs. Brown*, 165 Vt. 79, 676 A.2d 350, 354 (1996). These decisions merit consideration as being instructive for this case.

The Petitioner's argument should, for the simple reason that a suspended jail sentence is a sentence to a term of imprisonment within the meaning of the *Argersinger* and *Scott* decisions, be rejected.

II. A SUSPENDED SENTENCE AND PROBATION IS A DEPRIVATION OF LIBERTY WHICH INVOKES THE CONSTITUTIONAL RIGHT TO COUNSEL.

The Petitioner's argument over emphasizes the significance of the term "actual imprisonment" from the *Scott* and *Argersinger* opinions. It projects "actual

imprisonment" as the only sanction with which the *Argersinger* and *Scott* cases are philosophically concerned in the context of the constitutional right to counsel. An argument cast in these terms misses the full meaning of the *Scott* and *Argersinger* decisions.

A. The *Argersinger* and *Scott* cases are concerned with all uncounseled convictions which result in deprivation of liberty, not solely with those which result in physical restraint.

The dominating theme and goal of *Argersinger* and *Scott* is protecting against an uncounseled conviction that leads to a "deprivation of liberty". This mission is not limited to merely preventing a deprivation of liberty by immediate incarceration. Neither the *Scott* nor *Argersinger* (nor *Nichols*) holds or infers that a suspended jail sentence and probation in a misdemeanor case does not invoke the right to counsel. It was not, of course, necessary to consider that issue in either case. *Argersinger* involved an immediate jail sentence and *Scott* and *Nichols* involved only a fine. Petitioner's argument seeks to extend *Scott* (and *Argersinger* and *Nichols*) beyond their peculiar facts without considering the full import of the constitutional objective those cases sought to accomplish.

Citing principles established by such landmark decisions as *Powell vs. Alabama*, 287 U.S. 45 (1932) and *Gideon vs. Wainwright*, 372 U.S. 335 (1963), both the *Argersinger* and the *Scott* opinions make it clear that the basic function of the Sixth Amendment's right to counsel is to guarantee a fair trial in criminal prosecutions in order to protect the constitutional right of every person to liberty.

The thrust of both decisions is that government may not deprive a person of liberty through the agency of a criminal conviction, even if the conviction is only of a misdemeanor, if that person did not have the benefit of counsel in the guilt adjudication process. See also *United States vs. Ash*, 413 U.S. 300, 309 (1973); *Michigan vs. Harvey*, 494 U.S. 344, 348 (1990); *Strickland vs. Washington*, 466 U.S. 668, 684-85 (1984).

The *Argersinger* opinion speaks often of the right to counsel being related to the circumstance "where an accused is deprived of his liberty". 407 U.S. at 32. It defines the scope of the Court's consideration in that case by excluding cases "where loss of liberty is not involved". 407 U.S. at 37. The *Argersinger* opinion quotes approvingly from *Stevenson vs. Holgman*, 254 Ore. 94, 102, 458 P.2d 414, 418 (1969), which stated: "We hold that no person may be deprived of his liberty who has been denied the assistance of counsel . . . " 407 U.S. 37-38. The concluding sentence of the *Argersinger* majority opinion stresses the deprivation of liberty theme with these words:

> But in those that end up in the actual *deprivation of a person's liberty*, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy. 407 U.S. at 40. [Emphasis added]

The *Scott* opinion quotes the last sentence from the *Argersinger* opinion set out above. 440 U.S. at 370. The *Scott* opinion further emphasizes the concept that the evil to be avoided is a deprivation of liberty without the assistance of counsel in a further reference to the *Argersinger* opinion:

> The Court in its opinion repeatedly referred to trials 'where an accused is deprived of his liberty,' id., at 32, and to 'a case that actually leads to imprisonment even for a brief period,' id., at 33. The Chief Justice in his opinion concurring in the result also observed that 'any deprivation of liberty is a serious matter' id., at 41.

The *Argersinger* and the *Scott* opinions can only be read as pronouncements on a broader concern than purely physical restraint by confinement – the concern that no defendant be deprived of liberty by a criminal conviction obtained in a proceeding where the defendant was not afforded the right to counsel. Actual imprisonment, or physical restraint, as the prior decisions of this Court discussed below make clear, is only one form of deprivation of liberty. Therefore, a core issue of the present case is whether a suspended jail sentence and the imposition of a term of probation is a deprivation of liberty. If it is, no apparent rationale exists for the constitutional right to counsel to be denied in such cases.

B. A suspended sentence on the condition of probation is a deprivation of liberty.

To fully appreciate the concept of "deprivation of liberty" it is instructive to first fully appreciate the concept of "liberty". *Webster* defines liberty as "the quality or state of being free", "freedom from usually external restraint or compulsion", "the power to do as one pleases", and "exemption from subjection to will of another". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1303 (1971). Decisions of this Court have elaborated on the meaning of liberty as guaranteed by the

Constitution. In *Meyer vs. Nebraska*, 260 U.S. 390 (1923) this Court spoke of liberty in broad terms:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of ones own conscience, and generally to enjoy those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men.

260 U.S. at 399. In *Bolling vs. Sharpe*, 347 U.S. 497 (1954) this Court made it clear that liberty:

> . . . is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue . . .

347 U.S. at 499. The same idea that "liberty" is a broad right and is not confined to mere freedom from physical restraint can be found in other decisions. See, e.g., *Washington vs. Gluckenberg*, 521 U.S. 702, 719 (1997); *Michael H. vs. Gerald D.*, 491 U.S. 100, 121 (1989); *Board of Regents vs. Roth*, 408 U.S. 564, 572 (1972). When *Argersinger* and *Scott* spoke of "liberty" they undoubtedly were referring to the same concept as described and defined in these cases.

Decisions of this Court have also been specific in identifying the components of liberty. It has been made clear that the liberty guaranteed by the Constitution includes: the right to travel (see *Zemel vs. Rusk*, 381 U.S. 1, 14 [1965]; *Kent vs. Dulles*, 357 U.S. 116, 125-26 [1958]), the right of association (see *United States vs. Robel*, 389 U.S.

258, 262-63 [1967]; *Bates vs. Little Rock*, 361 U.S. 516, 522 [1960]; *N.A.A.C.P. vs. Alabama*, 357 U.S. 449, 460 [1958]), the right to choose and follow an occupation or profession (see *In Re: Griffiths*, 413 U.S. 717, 720 [1973]; *Allgeyer vs. Louisiana*, 165 U.S. 578, 589-90 [1897], the right of free speech (see *Hustler Magazine vs. Falwell*, 485 U.S. 46, 51 [1988]; *Consolidated Edison Company vs. Public Service Commission of New York*, 447 U.S. 530, 534 [1980]), and the right of privacy and freedom from governmental intrusion (see *Roe vs. Wade*, 410 U.S. 113, 152 [1973]; *Katz vs. United States*, 389 U.S. 347, 350 [1967]; *Elkins vs. United States*, 364 U.S. 206, 213 [1960]). Any restrictions on the exercise of any of these rights is obviously a deprivation of liberty.

A suspended sentence and the imposition of probation following a conviction unquestionably interferes with the "full range of conduct which the individual is free to pursue" and invariably operates to deprive a probationer of some of "those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men.". This conclusion was pointedly recognized by this Court in *Griffin vs. Wisconsin*, 483 U.S. 868, 874 (1987) with the statement that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled'." This is true from the moment probation is imposed.

A brief reference to some of the liberty-depriving consequences of probation that are permitted in the United States will further illustrate the conclusion that probation is destructive of liberty. A probationer's freedom of association can be impaired in that a probationer can be restricted from associating with or even contacting

certain persons. See, e.g., 18 U.S.C. § 3563(b)(6); *United States vs. Bortels*, 962 F.2d 558, 559-60 (6th Cir. 1992); *King vs. State*, 574 So.2d 1013, 1014 (Ala. Crim. App. 1990); *State vs. Nickerson*, 164 Ariz. 121, 791 P.2d 647, 649 (1990); *State vs. Davis*, 107 Idaho 215, 687 P.2d 998, 1000 (1984); *People vs. Kimbrell*, 291 Ill. App. 3d 605, 684 N.E.2d 443, 445 (1997); *People vs. DiStefano*, 550 N.Y.S.2d 989, 992 (1989). A probationer can be required to remain in a specified geographical area or to refrain from going into a specified geographical area, thereby restricting freedom of travel. See, e.g., 18 U.S.C. § 3563(b)(13), (14); *United States vs. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981); *King vs. State*, 574 So.2d 1013, 1014 (Ala. Crim. App. 1990); *Weaver vs. State*, 515 So.2d 79, 82 (Ala. Crim. App. 1987); *Sherer vs. State*, 486 So.2d 1330, 1332-33 (Ala. Crim. App. 1986); *People vs. Brockelman*, 933 P.2d 1315, 1319-20 (Colo. 1997); *Edwards vs. State*, 173 Ga. App. 589, 327 S.E.2d 559, 561 (1985); *People vs. Pickens*, 186 Ill. App. 3d 456, 542 N.E.2d 1253, 1256 (1989); *Gibbons vs. State*, 775 S.W.2d 790, 795 (Tex. App. 1989). Most probationers are required to report as directed to a probation officer, a requirement that may affect the right to travel and which certainly affects the right to be free from external compulsion. See, e.g., 18 U.S.C. § 3563(b)(15); ALA. CODE § 15-22-52 (1975). A probationer may have restrictions placed on participation in political activities, which impairs free speech and expression. See *United States vs. Turner*, 44 F.3d 900, 903 (10th Cir. 1995); *Markley vs. State*, 507 So.2d 1043, 1050-52 (Ala. Crim. App. 1987); *Land vs. State*, 262 Ga. 898, 426 S.E.2d 370, 374 (1993); *Hoffart vs. State*, 686 S.W.2d 259, 264 (Tex. App. 1985). A probationer does not have the same right of privacy and freedom from unreasonable

searches as other persons. See *Griffin vs. Wisconsin, supra* at 874. In some jurisdictions a consent to a warrantless search is recognized as a proper condition for probation. See, e.g., *United States vs. Gordon*, 540 F.2d 452, 453 (9th Cir. 1976); *State vs. Turner*, 142 Ariz. 138, 688 P.2d 1030, 1036 (1984); *People vs. Mason*, 97 Cal. Rptr. 302, 488 P.2d 630, 632 (1971); *State vs. Josephson*, 125 Idaho 119, 867 P.2d. 993, 996 (1993). In this same vein, the federal probation statute requires a probationer to permit a probation officer to visit in the probationer's home and requires a probationer to answer any inquiries of a probation officer. See 18 U.S.C. § 73563(b)(16), (17). A probationer can be required to submit to a polygraph test. See, e.g., *People vs. Miller*, 256 Cal. Rptr. 587, 589 (Cal. App. 1989); *Mann vs. State*, 154 Ga. App. 677, 269 S.E.2d 863, 866 (1980). A probationer can be prohibited from engaging in a certain occupation or profession. See, e.g., 18 U.S.C. § 3563(b)(5); *United States vs. Brockway*, 769 F.2d 263, 265 (5th Cir. 1985); *United States vs. Tolla*, 781 F.2d 29, 34-35 (2nd Cir. 1986); *Berra vs. United States*, 221 F.2d 590, 598 (8th Cir. 1955); *Whaley vs. United States*, 324 F.2d 356, 359 (9th Cir. 1963). Probationers can be required to spend part of their time in custody. See, e.g., 18 U.S.C. § 3563(b)(10); *Bowers vs. State*, 565 So.2d 1203, 1205-06 (Ala. Crim. App. 1990); *People vs. Horton*, 628 P.2d 117, 119 (Colo. App. 1980); *State vs. Williamson*, 237 So.2d 69, 70 (Fla. App. 1970); *People vs. Simmons*, 35 Ill. App. 3d 627, 342 N.E.2d 187, 190 (1976). Probationers can be restricted in the use or consumption of alcoholic beverages. See, e.g., *Jent vs. State*, 495 So.2d 123, 126 (Ala. Crim. App. 1986); *State vs. Janise*, 116 Ariz. 557, 570 P.2d 499, 502 (1977); *People vs. Mitchell*, 178 Cal. Rptr. 188, 190, 125 Cal. App. 3d 715 (1981); *Upchurch vs. State*,

289 Minn. 520, 184 N.W.2d 607, 608 (1971). Probationers can be required to issue public apologies or do other things that call attention to their violation of the law. See, e.g., *United States vs. Clark*, 918 F.2d 843, 848 (9th Cir. 1990); *Lindsay vs. State*, 606 So.2d 652, 657-58 (Fla. App. 1992); *Ballenger vs. State*, 210 Ga. App. 627, 436 S.E.2d 793, 794-95 (1993). In Alabama the conditions of probation may be modified by a court without a hearing and without notice, a seemingly obvious due process denial. See Ala.R.Crim.P. 27.2; *Thomas vs. State*, 508 So.2d 310, 313-14 (Ala. Crim. App. 1987). While this list is not intended to be exhaustive, it serves to illustrate that a sentence of probation, from the time it is entered, is inherently a deprivation of a probationer's liberty. See *Frank vs. United States*, 395 U.S. 147, 154 (1969) (Warren, C.J., dissenting).

Further deprivations of liberty face a probationer who is accused of violating the terms of probation and threatened with revocation. These restrictions are more fully discussed in Part III of this brief.

A decision in this case should be a substantiation of the teachings of *Argersinger* and *Scott* that there can be no deprivation of liberty by a process that does not meet constitutional standards. The *Argersinger* and *Scott* cases inculcate that a suspended sentence and probation in a misdemeanor case, being a deprivation of the defendant's liberty, is a case that requires a defendant be afforded the right of counsel. The argument that a defendant in such circumstances has no right of counsel should be rejected.

III. A PROBATIONER WHO IS INCARCERATED TO SERVE A SUSPENDED SENTENCE FOLLOWING REVOCATION OF PROBATION SUFFERS ACTUAL IMPRISONMENT.

Even if it be conceded for purposes of argument that a suspended sentence and probation is not "actual imprisonment" or a "deprivation of liberty" when imposed, the Petitioner's argument for a rule that excludes misdemeanor defendants who receive such a penalty from the protection of the Sixth Amendment's right to counsel ignores the effect of such a rule where probation is revoked and a probationer incarcerated. The briefs of Petitioner and Amici aligned with it contain no reference to this aspect of the present issue. By ignoring this subject they tacitly argue that it is constitutionally permissible to incarcerate a revoked probationer even though no right of counsel was afforded before the probationer's guilt was established and a suspended sentence imposed. *Argersinger*, Petitioner submits, does not sanction uncounseled incarceration that is merely delayed.

The fact that a revoked and incarcerated probationer suffers actual imprisonment is, of course, obvious. The revoked probationer's imprisonment is no less "actual" or "real" than that of the defendant who is sentenced and immediately incarcerated.

Probation, must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective. The reality of probation revocation, and its fairly high incidence, and the stark truth that for many defendants a suspended sentence and probation is only a way

station on the road to incarceration, compels a consideration of whether the rule advocated by the Petitioner can be squared with the standard of the *Scott* and *Argersinger* decisions – i.e., that no person convicted of a misdemeanor suffer imprisonment who is not afforded the right to counsel at trial.

A. Substantial numbers of misdemeanor probationers are incarcerated following revocation of probation.

The frequency and volume of incarcerations of misdemeanants upon revocation of probation is somewhat difficult to quantify because of lack of precise statistics. Available statistics and studies point to the certain conclusion that many misdemeanor probationers are revoked and incarcerated. The fact that many of these incarcerated probationers had no counsel at trial, especially in those jurisdictions that follow the rule advocated by the Petitioner, seems reasonably certain.

Statistics published by the United States Department of Justice show that in 1996-1999 time period the numbers of adults on probation in the United States were:

1996 – 3,164,996
1997 – 3,296,513
1998 – 3,670,591
1999 – 3,773,624

See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 484, U.S. DEPT. OF JUSTICE (1999). Press releases issued

by the Bureau of Justice Statistics of the Justice Department show that in these same years the following percentages of those probationers were on probation for non-felony offenses:

1996 – 45%
1997 – 46%
1998 – 43%
1999 – 48%

See Bureau of Justice Statistics, U.S. Dept. of Justice, Press Releases (August 18, 1997, August 16, 1998, August 22, 1999, July 23, 2000). These same press releases show that in these years the following numbers of probationers had their probation terminated for all reasons:

1996 – 1.5 million
1997 – 1.6 million
1998 – 1.5 million
1999 – 1.9 million

Of these terminated probationers the Justice Department press releases show the following percentages were terminated and reincarcerated for violating the conditions of probation:

1996 – 18% (or approximately 270,000)
1997 – 17% (or approximately 272,000)
1998 – 18% (or approximately 270,000)
1999 – 14% (or approximately 266,000)

Admittedly, these figures do not show the number or percentage of re-incarcerated misdemeanor probationers. However, statistics published by the Department of Justice for Federal probations for 1997 and 1998 show that about 30% of Federal misdemeanor probationers who were terminated in 1997 and about 20% of Federal misdemeanor probationers who were terminated in 1998 were

terminated for violation of probation conditions or new crimes.[3] See COMPENDIUM OF FEDERAL JUSTICE STATISTICS 81, U.S. DEPT. OF JUSTICE (1997); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 494, U.S. DEPT. OF JUSTICE (1999). These statistics indicate that Federal misdemeanor probationers were re-incarcerated at a higher rate than probationers in general in these years. Even if the percentage of misdemeanant revocations for these years were the same as the misdemeanants' percentage of all probationers (i.e., 45%, 46%, 43% and 48%), the Justice Department figures indicate that for these four years well over 100,000 misdemeanor probationers were reincarcerated each year.

Published studies in professional journals indicate high revocation rates for probationers. A study published in *Corrections Compendium* of a survey of probationer recidivism in 79 counties in Michigan showed 47 percent of the probationers in that study who left probation had their probation revoked. See Maxwell, Bingham, Gray, Combs, *Examining Probationer Recidivism in Michigan*, CORRECTIONS COMPENDIUM (December 2000). This same study reports earlier studies where revocation rates ranged from 19 percent to 62 percent. A study published in the June 1993 edition of *Federal Probation* includes a review of the literature on the outcome of probation and concludes that failure rates (which should be a rough equivalent of revocation and re-incarceration) range from 14 percent to 51 percent. See Morgan, *Factors Influencing*

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[3] A new crime, being a violation of law, is a standard probation violation. See 18 U.S.C. § 3563(a)(1); *Wilcox vs. State*, 395 So.2d 1054, 1056 (Ala. 1981).

Probation Outcome: A Review of the Literature, FEDERAL PROBATION 23 (June 1993).

While these statistics and studies do not precisely identify the number or percentage of uncounseled misdemeanor probationers who are incarcerated upon revocation of probation, they do illustrate a problem of considerable magnitude. Obviously, a large number of probationers are incarcerated because their probation is revoked. It seems reasonably certain from available statistics that a large number of these revoked probationers are misdemeanor probationers. Under the rule advocated by the Petitioner, each of these revoked misdemeanor probationers could have been constitutionally convicted at a trial where no counsel was afforded. The incarceration of even one revoked misdemeanor probationer who was not afforded counsel at trial is a failure to meet the constitutional standard expressed in *Argersinger* and *Scott* that, absent a knowing and intelligent waiver, "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial".

B. A suspended sentence and probation present a "practical possibility" of incarceration.

It is worth noting that the *Argersinger* opinion, while not explicitly dealing with the subject of suspended sentences and probation followed by revocation (those were not the facts of that case), does recognize (seemingly with approval) a generic event which would include a suspended sentence and probation that is subsequently revoked as presenting a circumstance where the right of counsel must be afforded. The opinion quotes at length

from the American Bar Association Project on Standards for Criminal Justice, which somewhat coincides with the ultimate ruling in *Argersinger*. Included in the quoted portions of the Standard is the Standard's own description of its dividing line between cases which warrant counsel and cases which do not warrant counsel:

> . . . it draws a categorical line at those types of offenses for which incarceration as a punishment is a *practical possibility*. (Emphasis added)

407 U.S. at 39.

Incarceration is certainly a "practical possibility" when there is a suspended jail sentence which can be made an actual jail sentence upon revocation of probation. Therefore, the American Bar Association Standard and the *Argersinger* opinion appear to recognize that counsel should be afforded where there is a suspended sentence which can become, through the "practical possibility" of probation revocation, incarceration.

C. Providing right to counsel will result in no constitutionally significant disparity between indigent and non-indigent misdemeanor defendants.

The argument in Amici's brief that affording counsel for suspended sentence cases will result in anomalous treatment of indigent and non-indigent defendants (Amici brief, p. 22 et seq.) dwells on an irrelevancy and misses the point of a much more significant anomaly that results from the position Amici advocate. The perceived disparity referred to in Amici's brief between the represented indigent and the unrepresented non-indigent who

chose to waive counsel has no constitutional implications. It is the result of free choice on the part of the non-indigent.

The disparity illustrated by the following scenario is not a result of free choice and does have constitutional implications: Prisoner A had counsel (either retained or appointed) at trial and was convicted of a misdemeanor and sentenced to a jail term and is serving it. Prisoner A's incarceration does not violate the *Argersinger-Scott* principle. Prisoner A's cell mate, Prisoner B, an indigent, was convicted of a similar misdemeanor at a trial with no counsel and was given a suspended sentence and probation. Subsequently, Prisoner B's probation was revoked and he was incarcerated to serve the previously suspended sentence. Both Prisoner A and Prisoner B are imprisoned, but Prisoner B's incarceration violates the *Argersinger-Scott* principle that no defendant be incarcerated who did not have the benefit of counsel at trial.

D. The failure to afford the right of counsel at trial to a convicted misdemeanant cannot be remedied by providing counsel at a probation revocation hearing.

The absence of counsel at trial (or plea) for the revoked probationer cannot be remedied by having counsel at a probation revocation hearing. First, it should be noted that the assurance of counsel at a probation revocation hearing is somewhat problematic under the present state of the law. See *Black vs. Romano*, 471 U.S. 606, 612 (1985); *Gagnon vs. Scarpelli*, 411 U.S. 778, 789, 790 (1973); *Byrd vs. State*, 717 So.2d 874, 875-76 (Ala. Crim. App.

1998). Even if counsel is provided at the revocation hearing, the probationer still has not had the benefit of the "guiding hand" of counsel at trial for the purpose of assuring a fair trial before conviction of the offense that will be the basis for incarceration upon revocation. See *Powell vs. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon vs. Wainwright*, 372 U.S. 335, 344 (1963).

A probation revocation hearing cannot, of course, re-examine the initial adjudication of guilt, which is the only stage of the proceedings against a defendant where counsel has a constitutional significance ("for his defense"). Moreover, a probation revocation hearing is not a criminal trial where the safeguards a defendant has in a criminal trial are available to protect against unwarranted revocation and incarceration. See *Morrissey vs. Brewer*, 405 U.S. 471, 480, 483 (1972); *McCaskey vs. State*, 589 So.2d 790, 791 (Ala. Crim. App. 1991). At probation revocation hearings the burden of proof standard is the reasonable satisfaction standard, not the beyond reasonable doubt standard. See *Powell vs. State*, 485 So.2d 379, 380 (Ala. 1986); see also, *Gagnon vs. Scarpelli, supra*, and *Morrissey vs. Brewer, supra*. The rules of evidence do not generally apply at probation revocation hearings and hearsay and other normally inadmissible evidence can be received. See Fed.R.Evid. 1101(d)(3); Ala.R.Crim.P. 27.6(d)(1); *Johnson vs. State*, 729 So.2d 897, 899 (Ala. Crim. App. 1997). At a probation revocation hearing illegally seized evidence may be admissible. See *United States vs. Brown*, 488 F.2d 94, 95 (5th Cir. 1973); *United States vs. Farmer*, 512 F.2d 160, 162 (6th Cir. 1975); *Ex Parte Caffie*, 516 So.2d 831, 833 (Ala. 1987); *Holcomb vs. State*, 644 So.2d 46, 47-48 (Ala. Crim. App. 1994). A probationer may be revoked for

committing another offense even though no conviction of the other offense has been obtained through the normal criminal trial process. See *Washington vs. State*, 577 So.2d 473, 474 (Ala. Crim. App. 1990); *Carlton vs. State*, 507 So.2d 998, 1002 (Ala. Crim. App. 1986). Evidence of statements by probationers made in violation of the *Miranda* rule have been held admissible in probation revocation hearings. See *United States vs. Johnson*, 455 F.2d 932, 933 (5th Cir. 1972); *Thompson vs. State*, 356 So.2d 757, 761 (Ala. Crim. App. 1978); *State vs. Fimbres*, 108 Ariz. 430, 501 P.2d 14, 16 (1972); *Commonwealth vs. Vincente*, 405 Mass. 278, 540 N.E.2d 669, 671 (1989).

Given these "weaknesses" of a probationer's position at a revocation hearing, which enhance the "practical possibility" of incarceration (see *Argersinger*, at 404 U.S. at 39), having counsel at a revocation hearing cannot be the equivalent of, or compensate for the lack of, counsel at trial where guilt was determined and where the "guiding hand", had it been available, may have avoided the conviction and/or suspended sentence which now mandates incarceration.

E. A pre-trial determination by a trial judge that no suspended sentence will be imposed as the penalty for a misdemeanor conviction can be made with the same facility that a determination can be made that no jail sentence will be imposed.

The *Argersinger* decision requires a judge trying a misdemeanor case where incarceration is an authorized penalty to engage in a pre-judging of the case because the judge must decide in advance of trial that no jail sentence

will be imposed if the right to counsel is not afforded. See 407 U.S. at 40. This process is somewhat of a venture into judicial clairvoyance because the judge must determine the appropriate penalty (or, at least, its upper limits) before trial. If the rule advocated by the Petitioner is adopted and judges in misdemeanor cases are permitted to sentence uncounseled defendants to suspended sentences and probation even greater clairvoyance will be required. To assure that *Argersinger's* requirements that no uncounseled defendant can be incarcerated is complied with the judge, it seems, will be required to know in advance of trial that an uncounseled defendant who receives a suspended sentence and probation will be able to successfully complete probation without revocation and incarceration. Otherwise, a suspended sentence and probation are mere hollow gestures that can never be enforced. See *United States vs. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991). Such a rule thrusts upon a judge the task of precisely predicting the future. This is an impossible task, but a necessary one under the rule advocated by Petitioner if probation is to continue as a meaningful sanction in misdemeanor cases and uncounseled misdemeanor probationers are not to be incarcerated.

Requiring such an impossible determination or useless gesture seems grossly inappropriate as a step in applying a standard for guaranteeing the constitutional right to counsel and a fair trial and preventing unconstitutional deprivations of liberty. If a judge can, and is required to, make a pre-trial determination regarding incarceration as an appropriate penalty for a particular charged offense, and to afford counsel on the basis of that determination, as *Argersinger* now requires, there is no

reason the judge cannot extend that pre-trial determination and decide before trial whether a suspended sentence and probation (and possible deferred incarceration) is an appropriate penalty and afford counsel based on that determination.

IV. *ARGERSINGER VS. HAMLIN* AND *SCOTT VS. ILLINOIS* SHOULD BE OVERRULED TO THE EXTENT THAT THEY DENY APPLICATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL TO MISDEMEANOR CASES WHERE IMPRISONMENT IS AN AUTHORIZED PENALTY.

In *Gideon vs. Wainwright*, 372 U.S. 335, 345 (1963) the Court recognized as unsound and reversed its earlier decision in *Betts vs. Brady*, 316 U.S. 455 (1942), which established the rule that whether a defendant has a right to counsel under the Sixth Amendment depends on a case-by-case analysis. 372 U.S. at 345. *Argersinger* and *Scott* effectively establish a case-by-case analysis rule for misdemeanor cases. They impose on a trial judge the responsibility in each misdemeanor case to determine whether the Sixth Amendment applies. And, most significantly, they require an analysis that easily can jeopardize the ability of a trial judge to fulfill the venerable role of a jurist in an independent and ordered judicial system. This hazard arises from *Argersinger's* direction to trial judges that they know in advance of trial whether a particular prosecution will merit imprisonment as a penalty and, armed with that knowledge, decide in advance of trial whether there is a right to counsel in the particular case. See 407 U.S. at 40. This, Petitioner submits, is a serious

flaw in the *Argersinger* and *Scott* decisions that, for the reasons discussed below, should be corrected.

The *Argersinger* opinion does not explain the process by which a trial judge is to obtain the information required to "have a measure of the seriousness and gravity of the offense" and "know when to name a lawyer" for a particular defendant in a particular case. If it is not to be made by whim, a correct determination about the appropriate penalty for a particular defendant in a particular case it seems would require the same kinds of information a judge would consider in sentencing after conviction. It is generally recognized that for purposes of sentencing judges have a right to, and must, acquire information from a multitude of sources (and are not restricted to legal evidence) in order to decide on an appropriate penalty. See, e.g., *Nichols vs. United States*, 511 U.S. 738, 747 (1994); *United States vs. Grayson*, 438 U.S. 41, 50 (1978). This would include such information as the nature of the defendant's conduct, the harm resulting from the defendant's conduct, the defendant's background and record, and the type of sanction best suited to promote deterrence as to the public and rehabilation as to the defendant.

Such information could be acquired by a trial judge in a number of ways, but there appear to be two general methods. One method would be by conducting an open, adversarial judicial hearing where evidence is presented under oath and the defendant is allowed to participate. Such a procedure, while assuring fairness and due process, hardly seems feasible. It could expend large amounts of judicial time and resources in an effort that has a limited purpose, or possibly no purpose. Such

information could be acquired by the judge from a private source. The most likely private source would be the prosecuting attorney or a law enforcement officer. Any private source (particularly the ones mentioned), it seems, presents insurmountable due process problems. Consequently, the *Argersinger* requirement leaves a trial judge on the horns of a dilemma as to how to properly carry it out.

Misdemeanor cases are typically tried without a jury. The judge is the trier of facts. In Alabama, for instance, all misdemeanor prosecutions not initiated by indictment and all prosecutions of municipal ordinance violations are tried before only a judge (although there is a right of appeal and trial de novo before a jury). See ALA. CODE §§ 12-12-3, 12-12-32(a), 12-12-70(b) (1975). Due process requires a fair trial in a fair tribunal. *Bracy vs. Gramsley*, 520 U.S. 899, 904 (1997). A fair tribunal is unlikely to exist where the judge and trier of fact is supplied unsworn information which is not tested by cross examination about the offense to be tried and about the defendant to be tried before the trial actually begins. See *In Re: Murchison*, 349 U.S. 133, 136-38 (1955). Moreover, the possession of such information might render a judge subject to disqualification under the Canons of Judicial Ethics as having personal knowledge of disputed evidentiary facts. See, e.g., ALA. CANONS OF JUDICIAL ETHICS 3C(1)(a).

The pre-trial determination a trial judge is required by *Argersinger* to make is antithetical to the role of the trial judge as an impartial trier of facts. This is true whether counsel is appointed or not appointed. The conduct of the defendant which is the basis of the charge, the defendant's background (including any criminal record),

and the harm done to any victim are obviously necessary considerations in making the required assessment about an appropriate penalty. Some of this information, particularly a defendant's record, would not likely be admissible evidence at trial. To be an impartial trier of facts it is obviously inappropriate that the judge, in advance of trial and before hearing the trial evidence and making a determination of guilt or innocence, have information, some of which may be highly prejudicial to the defendant (or the prosecution) and which, as a practical matter, it would be difficult or impossible for the judge to disregard in deciding guilt or innocence. See *In Re: Murchison, supra.* A judge who is informed of such matters in advance of trial cannot serve as an impartial trier of fact.

Further, making a pre-trial determination about the bounds of punishment for a particular case undermines the traditional judicial role in sentencing a defendant in the event of a conviction. Traditionally, judges exercise great discretion in determining the appropriate penalty for a particular offense and a particular defendant after hearing the trial evidence. See, e.g., *United States vs. Tucker*, 404 U.S. 443, 446 (1972); *Goolsby vs. State*, 283 Ala. 269, 270, 215 So.2d 602 (1968). If a sentencing judge has, in obedience to the requirements of *Argersinger*, made a determination in advance that no sentence of imprisonment will be imposed in a particular case the judge is, after conviction, powerless to impose imprisonment. This is true even if the facts developed at trial or by information secured in an orderly and proper way following conviction pursuant to a sentencing judge's inherent right, which were not known pre-trial, show the defendant's conduct or record was extremely egregious and

imprisonment is manifestly warranted for the particular defendant and the particular offense. Providing counsel for all offenses where incarceration is an authorized penalty will eliminate this derogation of inherent judicial power.

The Court should recognize these flaws in the *Argersinger* and *Scott* decisions, just as the Court in *Gideon vs. Wainwright* recognized the flaw in *Betts vs. Brady*. These flaws should be removed by overruling these decisions to the extent they infringe upon the proper and traditional role of a trial judge and by replacing them with a rule that is more philosophically consistent and more workable in practice. The obvious replacement, it seems, to the practice mandated by *Argersinger* is the rule rejected by the *Argersinger* and *Scott* decisions – that the right of counsel applies in all cases where imprisonment is an authorized penalty. Many states now follow this practice (See App. To Amici brief, pp. 1a-8a). This fact is an indication that experience has shown it to be a fairer and more workable arrangement.

V. A STRAIN ON PUBLIC RESOURCES DOES NOT JUSTIFY UNCOUNSELED MISDEMEANOR TRIALS WHICH RESULT IN DEPRIVATION OF LIBERTY.

The argument in the briefs of Petitioner and Amici that affording the right of counsel to misdemeanor defendants who receive suspended sentences should be denied because it will severely tax public resources is wrong in theory and on principle and unsupported factually.

The contention that assuring constitutional rights will impose a burden upon the public treasury is not a novel argument. It no doubt was raised in *Powell vs. Alabama*, 287 U.S. 45 (1932); *Gideon vs. Wainwright*, 372 U.S. 335 (1963); *Coleman vs. Alabama*, 399 U.S. 1 (1970); *Boyd vs. Dutton*, 405 U.S. 1 (1972); *Argersinger vs. Hamlin*, 407 U.S. 25 (1972); and *Moore vs. Illinois*, 434 U.S. 220 (1977). Obviously, the implementation of the decision in each of those cases has required the expenditure of additional public funds. As this Court pointed out in *Mayer vs. City of Chicago*, 404 U.S. 189, 197-98 (1971), a "State's fiscal interest is . . . irrelevant" where the denial of the constitutional rights of due process and equal protection are concerned. Constitutional rights cannot be sacrificed to the contention that they are expensive.

On the factual side, neither Petitioner nor Amici have undertaken to quantify what is described as a financial burden. Apparently affording counsel in cases such as the present case has not been financially unbearable in those jurisdictions which now do so. From the appendix to the brief of Amici it appears that probably half of the States would definitely have afforded counsel for a defendant in a case like the present case (where a jail sentence was authorized) and a large number of others would probably have done so (depending on the meaning of such phrases as "incarceration is likely", conviction is a "practical possibility", where the accused person may be "deprived of liberty", etc.). The concurring opinion of Justice Powell in *Scott vs. Illinois* pointed out that at the time that case was decided the law in at least 33 states (and possibly as many as 40) would have required counsel be afforded to a

defendant faced with a charge like the Respondent faced in this case. 440 U.S. at 388.

The argument that cost and convenience trump rights guaranteed by the Constitution should never be adopted as the law. That is essentially the argument the Petitioner and Amici are making. That argument, especially where not articulated quantatively, should be rejected as a reason for not affording the right of counsel in suspended sentence cases.

CONCLUSION

Respondent prays that the petition be denied and that the judgment of the Supreme Court of Alabama be affirmed.

Respectfully submitted,

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No. 00-1214

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

REPLY BRIEF

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ARGUMENT

In the opening brief, the State of Alabama explained that, for purposes of determining when a defendant has a right to state-appointed counsel, the precedents of this Court have drawn a bright line between "actual imprisonment" and lesser penalties such as fines and the "mere threat" of incarceration. (Petitioner's Brief at 8, 9–15 (discussing *Scott v. Illinois*, 440 U.S. 367, 373 (1979)).) Further, the State established that the majority of federal and state courts, in reliance upon this standard, have concluded that a probationary or suspended sentence does not trigger the right to appointed counsel under the Sixth Amendment. *Id.* at 15–20 Finally, the State argued that rejection of the "actual imprisonment" standard would, without support in the Sixth Amendment or in the decisions of this Court, result in the unwarranted diversion of scarce judicial and public resources. *Id.* at 20–22

Shelton's brief calls none of these conclusions into question. Shelton ignores the underlying facts, including that he "understood his right to *employ* counsel." (Petitioner's Brief at 3 (emphasis added).) Indeed, the Alabama Supreme Court found that Shelton was aware that he could be represented by counsel "if he 'went and paid the money to hire a lawyer.'" App. 32. Despite these facts, Shelton never addresses the plain historical and textual distinction between the core Sixth Amendment right to retain counsel and the right to state-appointed counsel recognized in such decisions as *Gideon v. Wainwright*, 372 U.S. 335 (1963). Shelton chooses instead to acknowledge this distinction in a single footnote, while ignoring its relevance in the body of his argument. (Respondent's Brief at 4 n.1.)

This distinction, however, is critical. The State of Alabama does not seek a ruling declaring that the Sixth

Amendment denies misdemeanor defendants the right to retain counsel, even when they are never incarcerated. Rather, the State asks this Court to affirm its express holding in *Scott* that, unless incarcerated, misdemeanor defendants have no right to *state-appointed* counsel.

As to the contentions raised in Shelton's brief, aside from his novel and improper request that this Court overrule its three well-established precedents defining the limits of the right to appointed counsel, he misconstrues those precedents and the nature of his punishment in this misdemeanor case. Shelton urges this Court to eschew a "literal reading" of its decisions, which limit the right to appointed counsel in misdemeanor cases to those that result in actual imprisonment. (Respondent's Brief at 5.) Shelton then invites this Court to speculate that he will violate the terms of his unsupervised probation and suffer "actual incarceration," when, in fact, no such risk exists. Building on these arguments, Shelton would have this Court depart radically from the language of the Sixth Amendment and hold that the imposition of probation alone gives rise to a right to appointed counsel in a misdemeanor case.

The State of Alabama submits five specific replies to Shelton's arguments. First, Shelton's unsupervised probation does not meet the standard of "actual imprisonment" that triggers the right to appointed counsel. Second, although it is a speculative and premature issue, Shelton clearly will not suffer actual imprisonment through a revocation of his probation, because the trial court may not enforce a sentence of imprisonment unless a defendant has been informed of his right to appointed counsel in the underlying prosecution. The court, of course, can enforce its orders, including the terms of probation, through other means, including its contempt power. Third, Shelton's request

that this Court overrule its well-established and workable precedents is improper. As this Court has held, Shelton is prohibited from seeking reversal of precedent without at least giving some notice of that intention in his opposition to the petition for certiorari. *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 170–71 (1999); *see* Sup. Ct. R. 15.2; *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 553 (1999). In his Brief in Opposition, Shelton accepted the continued validity of this precedent. Even if Shelton had timely raised this issue, he fails to provide any persuasive rationale for upending this settled law. Fourth, the pretrial determination whether to appoint counsel protects defendants by enabling incarceration only when appointed counsel is offered; this preliminary assessment does not prejudice a judge in the later exercise of his responsibilities at trial. Fifth, a further departure from the text of the Sixth Amendment would cause Alabama and other states to suffer unwarranted costs for the provision of counsel in misdemeanor cases that result only in suspended sentences or probation, but not in actual imprisonment.

Based on the argument contained in the opening brief and in this Reply brief, the State of Alabama urges this Court to reverse the decision below and adhere to the longstanding rule that the right to appointed counsel in misdemeanor cases exists only when the defendant is actually imprisoned.

I. SHELTON'S UNSUPERVISED PROBATION DOES NOT MEET THE STANDARD OF "ACTUAL IMPRISONMENT" ESTABLISHED IN *ARGERSINGER V. HAMLIN*, *SCOTT V. ILLINOIS*, AND *NICHOLS V. UNITED STATES*.

When first confronted with the application of the Sixth Amendment to misdemeanor cases, this Court ruled that appointed counsel was required only "where imprisonment *actually* occurs." *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972) (emphasis added). Adhering to that "delimit[ation]" seven years later, this Court distinguished "actual imprisonment" from the imposition of a "fine[] or the mere threat of imprisonment[,] . . . [and] adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott v. Illinois*, 440 U.S. 367, 373 (1979). In 1994, this Court reaffirmed that its decision in *Scott* drew "the line . . . [for Sixth Amendment protection] between criminal proceedings that *resulted* in imprisonment and those that did not." *Nichols v. United States*, 511 U.S. 738, 746 (1994) (emphasis added). These well-established precedents limit the right to appointed counsel to misdemeanor defendants in cases of physical incarceration, not, as here, unsupervised probation. Shelton's rejection of a "literal reading" of these cases and his attempt to blur this clear standard lacks merit.

A. The Differentiation Between Actual Imprisonment and the Mere Threat of Incarceration in *Argersinger*, *Scott*, and *Nichols* Establishes That the Imposition of Unsupervised Probation Does Not Require the Appointment of Counsel.

A misdemeanor defendant placed on unsupervised probation suffers neither actual imprisonment nor a deprivation of physical liberty. Under Alabama law, a

trial judge "may suspend execution of [a] sentence [with a term of less than 15 years] and place on probation any person convicted of a crime[.]" ALA. CODE § 15-22-50 (1995). By placing a misdemeanor defendant on probation, the judge "stops . . . execution" of the sentence. *Persall v. State*, 16 So. 2d 332, 334 (Ala. Ct. App. 1944). Indeed, far from undermining an offender's liberty interest, probation *enhances* an offender's liberty by returning him to society. The probationary term is imposed in lieu of imprisonment to "ameliorate the harshness of the law's judgment and give the convict a chance to show that he . . . is a fit subject and may be rehabilitated and become an acceptable citizen." *Ex parte State*, 472 So. 2d 1119, 1121 (Ala. 1985). Likewise, this Court has recognized that probation "is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity" to live in a free society. *Korematsu v. United States*, 319 U.S. 432, 435 (1943) (internal quotation omitted).

Shelton asserts that a probationary sentence effectively constitutes "actual imprisonment" and erroneously cites *Persall* for the proposition that probation is "a sentence of imprisonment the probationer is merely serving outside the prison walls." (Respondent's Brief at 7.) This argument fails; the *Persall* court expressly distinguished between parole following imprisonment and probation by virtue of a suspended sentence. 16 So. 2d at 334 ("The argument is inapposite that, in this State, a probationer is of the same status as a parolee who, under our parole statute . . . is declared as 'serving outside of prison walls' while on parole, with the result that such period is reckoned as in satisfaction pro tanto of the sentence of imprisonment."). This Court has similarly distinguished actual incarceration from fines and probation, recognizing that the latter do not "approximate in severity the loss of liberty that a prison

term entails. . . . because incarceration is an intrinsically different form of punishment." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (Sixth Amendment discussed in jury trial context) (internal quotation omitted).

Shelton also ignores the practical application of the probationary statute. An Alabama court, upon granting probation, "suspend[s] execution of [the] sentence" and liberates the defendant, subject to possible imprisonment in the event that the defendant violates the terms of probation. ALA. CODE § 15-22-50; Ala. R. Crim. P. 27.1;[1] Ala. R. Crim. P. 27.6(e);[2] *cf. Hicks v. Feiock*, 485 U.S. 624, 637 (1988) (in explaining that suspension of a sentence and imposition of probation for contempt does not affect its classification as civil or criminal in nature, this Court noted, "[w]hat is true of respondent . . . is also true of any such convicted criminal: *as long as he meets the conditions of his informal probation, he will never enter the jail*[]") (emphasis added). The potential for incarceration lingering under a probationary sentence exists only as "the mere threat of imprisonment" that this Court has squarely held does not trigger a right to appointed counsel.

Shelton erroneously construes the phrase "deprivation of liberty" in *Argersinger* in an expansive manner, and he wrongly contends that the infringement of *any* recognized

[1] The Rules of Criminal Procedure provide additional guidance for the imposition of probation, stating that, "[i]f the sentencing court is given authority to suspend sentence and to place the defendant on probation, the court may impose such conditions and regulations as will promote the probationer's rehabilitation and protect the public." Ala. R. Crim. P. 27.1.

[2] Upon violation of a condition of release, the trial court is authorized to "revoke, modify, or continue probation." Ala. R. Crim. P. 27.6(e).

liberty interest gives rise to a right to appointed counsel. This argument, however, fails to appreciate the *Argersinger* and *Scott* interpretations of "deprivation of liberty" under the Sixth Amendment. As explained in *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25, 26 (1981) (emphasis added), this Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not *result* in the defendant's loss of . . . *physical* . . . *liberty*." In *Lassiter*, this Court refused to appoint counsel for an indigent parent in a proceeding to terminate parental status. This Court reviewed its decisions under the Sixth Amendment and wrote that it is only "the defendant's interest in personal freedom" from physical confinement, not any broader liberty interest, "which triggers the right to appointed counsel[.]" *Id.*

The adoption of Shelton's argument would erase any meaningful distinction under the Sixth Amendment between "actual imprisonment" and a fine or probation. Shelton contends he faces the "practical possibility" of incarceration upon revocation of his probationary sentence (Respondent's Brief at 22), but ignores the reality that, until the court's sentencing terms are satisfied, a defendant often faces, at minimum, a threat of imprisonment. Even when a judgment requires only the payment of a fine, with no express provision for imprisonment, the law still often permits incarceration for the willful failure to pay that fine. *See* MODEL PENAL CODE § 302.2 (2000); *Little v. State*, 693 So. 2d 30, 31 (Ala. Crim. App. 1997) (ruling that trial court is authorized to hold misdemeanor defendant in contempt of court for nonpayment of fine, subject to an additional fine and five-day imprisonment). In approving the imposition of a fine backed by a threat of incarceration absent the assistance of counsel, and distinguishing "fines or the mere threat of imprisonment" from "actual imprisonment" in *Scott*, 440

U.S. at 373–74, this Court inherently authorized uncounseled probationary sentences. *See People v. Reichenbach*, 587 N.W.2d 1, 16 (Mich. 1998) ("The plain meaning of the words 'actual imprisonment' dictate the conclusion that defendant's conditional sentence did not constitute 'actual imprisonment.' "); *United States v. Smith*, No. 94-5627, 1995 WL 314892, at *2 (6th Cir. May 23, 1995) (unpublished opinion) ("Nowhere does [this] Court limit its holding to those misdemeanor convictions resulting in fines. Logically speaking, the 'mere threat of imprisonment' can only be read to include suspended sentences."), *cert. denied*, 516 U.S. 897 (1995).

B. In *Argersinger* and *Scott*, this Court Judged the Necessity of Counsel Based on the Final Disposition of the Case.

Shelton misconstrues *Argersinger* and *Scott* to mean that the "mere threat of imprisonment" refers only to a *pretrial* threat. (Respondent's Brief at 7.) The *Argersinger* Court held, however, that the right to appointed counsel under the Sixth Amendment extends only to misdemeanors that "*end up* in the actual deprivation of a person's liberty." 407 U.S. at 40 (emphasis added). The *Argersinger* Court considered and rejected Argersinger's and amicus curiae's arguments that the right to appointed counsel should pertain to any case where imprisonment was an authorized penalty. *Scott*, 440 U.S. at 374 n.4. Adopting *Argersinger*'s "actual deprivation" standard and refusing to "extrapolate [that] already extended line[,]" *id.* at 372, the *Scott* Court also rejected an "authorized penalty" argument. The *Scott* Court explained that *Argersinger* was founded on the "conclusion that incarceration was so severe a sanction that it should not be imposed as a *result of* a criminal trial unless an indigent defendant had been offered appointed counsel." *Id.* at 372–73 (emphasis added). At the end of a

trial, "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Id.* at 373.

II. ALTHOUGH IT IS A SPECULATIVE AND PREMATURE ISSUE, SHELTON WILL NOT SUFFER "ACTUAL IMPRISONMENT" THROUGH A REVOCATION OF HIS PROBATION BECAUSE THE TRIAL COURT CAN ENFORCE ITS ORDERS BY OTHER MEANS INCLUDING ITS CONTEMPT POWER.

Despite Shelton's suggestion to the contrary, the State of Alabama and its amici do not argue — "tacitly" or otherwise — that probation can be revoked and incarceration actually imposed regardless of whether an offender was informed of his right to appointed counsel. (Respondent's Brief at 17.) To the contrary, the State and its amici accept that, under *Argersinger* and *Scott*, a defendant cannot be actually incarcerated unless he was properly informed of his right to appointed counsel. Accordingly, there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation. Alabama trial courts are presumed to know the law and are aware of the prohibition against incarceration absent assistance of counsel. *See Sochor v. Florida*, 504 U.S. 527, 537 (1992) (when considering heinousness as an aggravating factor for a capital sentence, the reviewing court must "presume the trial judge to have been familiar with [the] body of case law"); *Strickland v. Washington*, 446 U.S. 668, 694 (1984) (in evaluating the prejudice element of an ineffective assistance of counsel claim, "a court should presume . . . that the judge . . . acted according to law").

Shelton's use of statistical information to support his argument that misdemeanor defendants placed on probation face a significant risk of imprisonment is equally unpersuasive. As Shelton concedes, his statistics "do not show the number or percentage of re-incarcerated misdemeanor probationers." (Respondent's Brief at 19.) Consequently, as Shelton also admits, he is merely speculating that it "seems reasonably certain" that "many of these incarcerated probationers had no counsel." *Id.* at 18. Shelton fails to support his position that the statistics verify his opinion.

Information obtained from the Alabama Administrative Office of Courts, which is displayed below, evinces the minimal risk that a misdemeanor defendant in Alabama would suffer "actual imprisonment."[3]

	1998	1999	2000	2001[4]
Total misdemeanors	116, 227	114, 951	116,092	78,048
Placed on probation	26, 504	25,707	26, 208	15,084
Revocations	787	388	340	52

Of the total number of misdemeanor defendants placed on *supervised* probation in Alabama, between one to three percent have their probation revoked. A misdemeanor defendant placed on *unsupervised* probation, such as Shelton, faces an even more remote possibility of

[3] The Alabama Administrative Office of Courts compiles its information based solely on the number of misdemeanor defendants released under supervised probation, as opposed to those, like Shelton, who are released on unsupervised probation.

[4] The Alabama Administrative Office of Courts collects its data based on its fiscal year. The 2001 information encompasses data ranging from October 1, 2000 through August 31, 2001.

revocation because he is not subject to regular scrutiny by a probation officer.

None of this suggests that courts are rendered powerless to enforce their probation orders. Contrary to Shelton's arguments, trial courts can employ various remedies without activating the probated sentence to ensure compliance with the terms of probation. Among the tools available to the trial court — should Shelton violate the terms of his probation by, for example, assaulting the victim again — are the imposition of supervised probation, requiring regular meetings with a probation officer, prohibiting contact with the victim, and ordering the payment of additional fines. ALA. CODE §§ 15-22-52 & 54(d) (1995).

Moreover, every Alabama court, like federal and other state courts, possesses the power of contempt to "compel obedience to its judgments, orders and process[.]" ALA. CODE § 12-1-7(3) (1995);[5] *see Young v. United States*, 481 U.S. 787, 795 (1987) ("[T]he power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." (quoting *Michaelson v. United States ex rel. Chicago*, 266 U.S. 42 (1924))). The trial court has the authority to hold Shelton in "constructive contempt"[6] for failing to pay his financial

[5] Section 12-1-7(3) provides that "[e]very court shall have power . . . [t]o compel obedience to its judgments, orders, and process and to orders of a judge out of court, in an action or proceeding therein[.]"

[6] If Shelton refused to comply with "a court's lawful . . . order, rule, or command[] [and] the dominant purpose of the contempt proceeding [was] to punish" him, the court could cite Shelton for criminal contempt. Ala. R. Crim. P. 33.1(b)(3)(b). Whereas, if the "court's . . . order, rule, or command[] . . . by its nature [was] still capable of being complied with[,]" the court could cite Shelton for civil contempt. Ala.

levies or for violating a term of his probation. Ala. R. Crim. P. 33.1(b)(2) (defining "constructive contempt"); *Little*, 693 So. 2d at 31 (trial court possesses "authority to conduct . . . contempt proceedings . . . in its attempt to collect the unpaid fine" imposed for defendant's misdemeanor crime).

During contempt proceedings, Shelton would receive the full panoply of due process as required by this Court in *Cooke v. United States*, 267 U.S. 517, 537 (1925) (during prosecution of contempt, accused must be "advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation . . . includ[ing] the assistance of counsel, if requested, and the right to call witnesses to give testimony"). He would be entitled to written notification describing the particular conduct constituting contempt of court and instructing him to appear at a particular time to show cause why he should not be punished. Ala. R. Crim. P. 33.3(b). Next, he would receive a hearing, "set so as to allow a reasonable time for the preparation of the defense" during which he would be "afforded the opportunity to present exculpatory evidence and evidence of mitigating and extenuating circumstances[,]" as well as "subpoena witnesses" and, most significantly for the argument advanced here, to "*be represented by counsel*[.]" *Id.*(d) (emphasis added). A sentence would then be "pronounced in open court, in [his] presence . . . not later than the latter of seven days after completion of all proceedings[.]" *Id.*(e). The maximum penalty faced would be a $100 fine and five days' imprisonment. ALA. CODE § 12-11-30(5) (1995). Proceeding under its contempt powers, the trial court would not violate Shelton's Sixth

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R. Crim. P. 33.1(b)(4). Regardless of the violation, Shelton would be subject to similar punishments.

Amendment right to counsel, yet the court would retain ample authority to enforce the terms of Shelton's probation.[7]

III. SHELTON'S REQUEST THAT THIS COURT OVERRULE *ARGERSINGER* AND *SCOTT* IS IMPROPER.

This Court should decline Shelton's alternative invitation to overrule *Argersinger* and *Scott* because he did not request that relief in a timely manner. In his Brief in Opposition, Shelton affirmatively embraced the continuing validity of *Argersinger* and *Scott*. Indeed, Shelton assumed the legitimacy of these cases and argued, relying on their holdings, that *Argersinger* and *Scott* did not "limit the right to counsel in misdemeanor cases to immediate imprisonment cases but extend[ed]

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[7] Both federal and some state trial courts have similar powers of contempt. 18 U.S.C. § 3663(g) (2001) ("If such defendant [under the Victim and Witness Protection Act] is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt . . . if the defendant fails to comply with such order."); ILL. REV. STAT. ch. 730, § 5-9-3 (Smith-Hurd 2001) ("An offender who defaults in the payment of a fine or any installment [imposed for his criminal offense] may be held in contempt and imprisoned for nonpayment"); IOWA CODE ANN. § 910.4(1)(b) (West 2001) (under the victim restitution law, "[i]f an offender fails to comply with restitution requirements during probation, the courts may hold the offender in contempt, revoke probation, or extend the period of probation"); *Ellis v. State*, 821 S.W.2d 56, 57 (Ark. Ct. App. 1991) (ruling that trial court properly declined to revoke defendant's suspended sentence and held defendant in criminal contempt for failing to pay restitution under Arkansas Hot Check Law, a class C felony).

the protection to cases where there is a sentencing to a term of imprisonment or a deprivation of personal liberty." (Respondent's Brief in Opposition at 4) Absent "notice of an intent to make so far-reaching an argument" in his previous filing, this Court must refuse to "entertain [Shelton's] invitation to . . . abandon . . . longstanding" precedent because he "did not make clear [he] intended to make this argument until [he] filed [his] brief on the merits." *South Cent. Bell*, 526 U.S. at 170–71; *see also* Sup. Ct. R. 15.2; *Kolstad*, 527 U.S. at 553 ("It is not this Court's practice to consider arguments — specifically, alternative defenses of the judgment under review — that were not presented in the brief in opposition to the petition for certiorari.").

This Court granted certiorari limited to the question whether, "[i]n the light of the 'actual imprisonment' standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and refined in *Scott v. Illinois*, 440 U.S. 367 (1979), . . . imposition of a suspended sentence or conditional sentence in a misdemeanor case" invokes the Sixth Amendment right to appointed counsel. Shelton's argument in support of overturning thirty years of precedent is not "fairly included" in evaluating the applicability of the Sixth Amendment to probationary sentences and, therefore, is not "'predicate to an intelligent resolution' of the question presented" in the State's brief. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996). This Court has not requested that the parties exceed the basis for certiorari to brief the issue; therefore, no further evaluation of Shelton's contention is warranted. *Payne v. Tennessee*, 498 U.S. 1080, 1080 (1991) (where this Court specifically requested the parties "brief and argue" whether its prior precedent "should be overruled").

Notwithstanding the procedural barriers that counsel against reaching Shelton's argument to overrule *Argersinger* and *Scott*, Shelton has not provided any persuasive basis for reconsidering those cases. Far from challenging the reasoning underlying those rulings, for thirty years this Court has adhered to and built on their holdings. (Petitioner's Brief at 12–14) When this Court in *Argersinger* and *Scott* refused to depart any further from the text of the Sixth Amendment, this Court crafted a meaningful and practical rule that would "not . . . affect[] . . .[t]he run of misdemeanors[.]" *Argersinger*, 407 U.S. at 40. This consistent line of reasoning has guided the great majority of federal and state appellate courts to deny the appointment of counsel in misdemeanor cases involving probationary sentences.[8]

IV. THE PRETRIAL DETERMINATION WHETHER TO APPOINT COUNSEL DOES NOT PREJUDICE A JUDGE IN THE LATER EXERCISE OF HIS RESPONSIBILITIES AT TRIAL.

Although Shelton complains that a trial judge would "pre-judge . . . the case" (Respondent's Brief at 25, 29–31), to determine whether a misdemeanor defendant is entitled to counsel, this issue has already been addressed in *Argersinger*:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even

[8] The Second, Fourth, Fifth, Sixth, and Eleventh Circuits, as well as numerous state supreme and appellate courts, have reasoned that probationary sentences do not invoke the Sixth Amendment right to counsel. *See* Petitioner's Brief at 16–19; States' Amicus Brief at 23 ("[M]any States have not gone beyond the minimum federal requirements imposed by this Court's decisions.").

> though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

407 U.S. at 40. In contrast to the public policy argument offered by Shelton, this Court made clear in *Argersinger*, 407 U.S. at 38, that, under Article III, it does "not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement."

Shelton fails to explain how the pretrial inquiries of the court to determine the need for counsel are unusual and unfairly prejudicial. Judges routinely evaluate the nature of a defendant's conduct and his criminal record before trial in deciding, for example, whether to grant pre-trial bond, in evaluating whether probable cause exists at a preliminary hearing, and in considering the defendant's competency or sanity. This Court has never presumed that these important pretrial inquiries interfere with a judge's ability to preside at trial in a fair and impartial manner. In addition, Shelton ignores the role of prosecutors, who are cognizant of the appropriate punishment for the crime and have a duty to notify the trial court of the need for counsel when the State intends to request imprisonment if a conviction is obtained. With open lines of communication, trial judges can effectively determine the prospect of imprisonment and the need for counsel.

In any event, the *Argersinger* pretrial inquiry only serves to protect and benefit the defendant. *See* States' Amicus Brief at 8–9. If a court prefers to preserve the option of actually incarcerating a defendant who eventually is found guilty, the defendant must be informed of his right to appointed counsel. If, however,

the court chooses not to make counsel available, the court loses the incarceration option. Whatever the outcome, the defendant remains fully protected.

V. A FURTHER DEPARTURE FROM THE TEXT OF THE SIXTH AMENDMENT WOULD CAUSE ALABAMA AND OTHER STATES TO SUFFER UNWARRANTED COSTS FOR THE PROVISION OF COUNSEL IN MISDEMEANOR CASES OF PROBATION.

The issue presented in this case is not, as Shelton would have it, whether states have an "expense" defense once a constitutional right has been established. To the contrary, the pertinent question is whether there is a Sixth Amendment right to state-funded counsel under the circumstances of this case. As shown in the State of Alabama's opening brief and above, there is no such right. While states, through their elected officials, are free to enact state laws that fund a right to appointed counsel in excess of the constitutional minimum, they should not be required to do so where the Constitution imposes no such obligation. Given the clear rule set forth in *Scott*, it should be left to the states to determine the proper scope of the right to state-funded counsel beyond that required by the Sixth Amendment. *See also* States' Amicus Brief at 22–28.

In evaluating the necessity of appointed counsel under the Constitution, this Court in *Scott* recognized that the costs to the states in providing indigent representation must be weighed in the light of the severity of the sentence imposed. This Court concluded that the gravity of actual incarceration in a misdemeanor case requires the appointment of counsel. *Scott*, 400 U.S. at 372–73 (explaining that the *Argersinger* court rejected a "social

cost" argument "because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed . . . unless an indigent defendant had been offered appointed counsel"). The *Scott* Court then drew a clear line: "*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse states." *Id.* at 373; *see also Argersinger*, 407 U.S. at 49 ("[w]here the possibility of a jail sentence is remote . . . the costs of assistance of counsel may exceed the benefits") (Powell & Rehnquist, JJ., concurring).

The State of Alabama possesses limited resources to supply counsel for indigent defendants.[9] Although those costs may be tolerable in some states, the appointment of counsel for misdemeanor probationary offenders in Alabama would divert scarce resources from more serious criminal cases and other priorities of the criminal justice system. It would congest the courts, delay their provision of justice, and undermine the antirecidivism policies of the states. Principles of federalism strongly support the

[9] Although other states may provide a greater right to counsel predicated "on their own constitutions or public policy," *Nichols*, 511 U.S. at 748 n.12, the right to counsel under Alabama law is founded on the guarantee contained in the Sixth Amendment to the United States Constitution. Ala. R. Crim. P. 6.1 commentary at 36 ("The basis of Rule 6.1 is the right of a criminal defendant under Art. 1 § 6, Alabama Constitution of 1901, and the Sixth Amendment to the United States Constitution to be represented by counsel in all criminal prosecutions."); *Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000) (predicating its decision to require counsel based on "the rationale of *Reilley*, *Argersinger*, and *Scott*"); *see also Ex parte State*, 783 So. 2d 103, 106 (Ala. 2000) (in adopting the *Nichols* standard to allow enhancement of a later conviction with a prior uncounseled conviction for driving under the influence of alcohol, the court reasoned that, "under the circumstances presented ... the Alabama Constitution does not afford a defendant greater due-process protections than the Federal Constitution").

continued freedom of the states to manage their scarce judicial resources, as they deem appropriate, in cases of misdemeanors where the defendants suffer only probation, not actual imprisonment. A further departure from the text of the Sixth Amendment is, therefore, unwarranted.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF TO AMICUS CURIAE PROFESSOR CHARLES FRIED

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ARGUMENT

The State of Alabama respectfully submits this Brief in response to the brief filed by Professor Charles Fried, as *amicus curiae*. In compliance with the directive of the Court, Professor Fried advocates the following position: "where counsel is not afforded to an indigent defendant, the Constitution of the United States does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked." Consistent with Professor Fried's position, Alabama has argued in its opening and reply briefs that the imposition of a suspended or probationary sentence, following an uncounseled misdemeanor conviction, does not violate the text of the Sixth Amendment, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), or *Scott v. Illinois*, 440 U.S. 367 (1979). Unlike Alabama in its initial reply brief, however, Professor Fried argues an expansive reading of *Argersinger* and *Scott*, which would permit activation of an uncounseled misdemeanant's suspended sentence, because imprisonment does not immediately occur on imposition of the sentence. Professor Fried's reading of *Argersinger* and *Scott* is plausible, fully consistent with the text of the Sixth Amendment, and one that Alabama would welcome. In the light of the language and reasoning contained in *Argersinger* and *Scott*, however, Alabama maintains that activation of a probated sentence for an uncounseled misdemeanant is precluded. Alabama also maintains that contempt is an effective and logical tool for the enforcement of probation orders.

I. FRIED'S INTERPRETATION OF *ARGERSINGER* AND *SCOTT* IS PLAUSIBLE AND CONSISTENT WITH THE TEXT OF THE SIXTH AMENDMENT.

In his brief, Professor Fried focuses primarily on the question whether the revocation of Shelton's probation and later imprisonment would violate the Sixth Amendment. This question is, however, speculative based on the procedural posture of this case. As explained in Alabama's initial reply brief, no effort has been made at any time to revoke Shelton's probation and incarcerate him. (Alabama Reply Brief at 9) Any evaluation regarding the constitutionality of such an action is, therefore, premature. Should this Court choose to address the issue, however, Professor Fried's proposed reading of *Argersinger* and *Scott* is plausible and, Alabama admits, more consistent with the text and original meaning of the Sixth Amendment than the position espoused in Alabama's initial reply brief. (*See* Alabama Reply Brief at 9.)

A. Professor Fried's Reading Of *Argersinger* and *Scott* Is Closer to the Original Meaning of the Sixth Amendment.

Despite expansive judicial interpretations of the right to counsel, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott v. Illinois*, 440 U.S. at 370, *citing* W. Beaney, *The Right to Counsel in American Courts* 27-30 (1955). The Sixth Amendment did not require appointed counsel in any

misdemeanor proceeding, including those resulting in imprisonment. Indeed, *Amici* Texas, *et al.*, have provided an extensive explanation of the history of the provision, conclusively demonstrating that, "as enacted, [it] provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel." (Texas, *et al.* Brief at 14-21) This Court recognized as much in its first opinion addressing the scope of the Sixth Amendment right to counsel. *See United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (holding that "[t]here is . . . no general obligation on the part of the government . . . to . . . retain counsel for defendants"). Professor Fried's contention that a suspended sentence, imposed following an uncounseled misdemeanor conviction, may be constitutionally activated is, therefore, entirely consistent with the text of the Sixth Amendment.

Moreover, Professor Fried presents a plausible reading of *Argersinger* and *Scott*. In *Argersinger*, this Court held that an indigent defendant, in a misdemeanor case, is entitled to appointed counsel "where imprisonment actually occurs." *Argersinger*, 407 U.S. at 38. *Scott* reaffirmed "the central premise of *Argersinger*[,]" holding that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. Professor Fried contends that imprisonment following activation of a suspended sentence does not violate *Argersinger* and *Scott* because the imprisonment does not occur immediately on imposition of the sentence. Furthermore, if imprisonment does result, it results, not from the underlying misdemeanor conviction, but from a subsequent probationary violation. Therefore, because actual imprisonment does not occur as a result of the conviction,

but instead as a result of a defendant's own actions resulting in a revocation of probation, the right to counsel is not implicated. This reading of *Argersinger* and *Scott* is consistent with the text of the Sixth Amendment and is one to which Alabama would not object. As is discussed in part II of this reply brief, however, it is not the most plausible reading of those decisions.

B. Professor Fried's Reading of *Argersinger* and *Scott* Would Give the States Greater Flexibility in Dealing with Misdemeanor Defendants Who Violate the Terms of Their Probation.

Reading *Argersinger* and *Scott* to preclude the activation of a suspended sentence obviously restricts the manner in which a sentencing authority can punish a defendant who violates the terms of his probation. Absent the option of activating a suspended sentence, a trial court must search for other remedies to enforce the terms of probation, such as the imposition of supervised probation, requiring regular meetings with a probation officer, prohibiting contact with the victim, ordering the payment of additional fines, and the utilization of its contempt powers. All of these methods of ensuring compliance with the terms of probation require the expenditure of additional time and resources. A broader reading of *Argersinger* and *Scott* to allow activation of the suspended sentence, even where counsel is not provided at trial, would provide greater flexibility in dealing with the misdemeanor defendant who violates the terms of his or her probation. It would also plainly provide a defendant with significant motivation to comply with the probation orders of the court.

II. DESPITE THE PLAUSIBILITY OF PROFESSOR FRIED'S INTERPRETATION, ALABAMA'S READING OF *ARGERSINGER* AND *SCOTT* IS THAT ACTIVATION OF A SUSPENDED SENTENCE IN A MISDEMEANOR CASE IS PRECLUDED WHEN THE DEFENDANT WAS UNCOUNSELED AT TRIAL.

As reflected in its initial reply brief, the State of Alabama has read *Argersinger* and *Scott* to preclude the activation of a suspended sentence imposed following an uncounseled misdemeanor conviction. (*See* Alabama Reply Brief at 9) (stating that "there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation"). Plainly, such an action would not violate the Sixth Amendment right to counsel as originally adopted. By its own admission, however, this Court has "departed from the literal meaning of the Sixth Amendment," *Scott*, 440 U.S. at 372, "expanded the language . . . well beyond its obvious meaning," *Nichols v. United States*, 511 U.S. 738, 746 (1994), and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. The line has, therefore, been "drawn between criminal proceedings that result[ ] in imprisonment, and those that [do] not." *Nichols*, 511 U.S. at 746, *citing Scott*, 440 U.S. at 372. Therefore, the question presented is whether imprisonment following the revocation of probation, as opposed to imprisonment immediately following an uncounseled misdemeanor conviction, constitutes "actual imprisonment" within the meaning of *Argersinger* and *Scott*. The most plausible reading of

Argersinger and *Scott* precludes either form of imprisonment. A trial court may still, however, enforce its probation orders in a variety of ways, including its inherent powers of contempt.

A. Professor Fried's Position, While Plausible, Is at Odds With Some of the Language and Reasoning of *Argersinger* and *Scott*.

Professor Fried reads the rule of "actual imprisonment" to apply only to "those misdemeanor defendants whose cases result in *immediate* actual imprisonment." (Fried Brief at 13) (emphasis added). In adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel," however, this Court did not state, that, to fall under the ruling, the incarceration must be immediate. *Scott*, 440 U.S. at 373. Moreover, *Argersinger* and *Scott* address the *final* disposition of misdemeanor proceedings, not merely the immediate consequence of a trial. *See Argersinger*, 407 U.S. at 40 (extending the right to appointed counsel to those misdemeanors "that *end up* in the actual deprivation of a person's liberty") (emphasis added); *Scott*, 440 U.S. at 373 (relying on the references in *Argersinger* "to trials 'where an accused is deprived of his liberty' " and "to 'a case that actually *leads to* imprisonment even for a brief period' ") (emphasis added). Indeed, the rule announced in *Argersinger* requires a trial judge to consider the final disposition of the proceedings even before their commencement. *See Argersinger*, 407 U.S. at 40 ("Under the rule we announce today, every judge . . . will have a measure of the seriousness and gravity of the offense and

therefore know when to name a lawyer to represent the accused before the trial starts.").

Professor Fried relies on *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), to support his reading of *Argersinger* and *Scott*. (Fried Brief at 11) *Nichols* and *Gagnon* are, however, distinguishable. In both *Nichols* and *Gagnon*, unlike here, the defendant was imprisoned following a felony trial in which the defendant had a right to counsel, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Professor Fried's position is additionally based upon a contention that, "[b]ecause Shelton's sentence was valid at the time it was imposed, Alabama may revoke the conditional sentence without violating Shelton's constitutional rights." (Fried Brief at 14) It is difficult, however, to reconcile this contention — that a constitutionally valid sentence remains so even after the very basis of its validity is removed — with simple logic. Under *Argersinger* and *Scott*, Shelton's sentence of imprisonment was constitutionally valid when entered *only* because it was, in fact, *not imposed*; it was suspended. A suspended sentence of imprisonment does not violate the holdings of *Argersinger* and *Scott* precisely because it does not result in "actual imprisonment."

Professor Fried asserts that the revocation of probation and accompanying activation of a suspended sentence is a proceeding apart from that resulting in the conviction. (Fried Brief at 12-13) Again, relying on *Nichols* and *Gagnon*, he contends that "the extent of the right to appointed counsel must be determined separately for

each proceeding." (Fried Brief at 12) Following a misdemeanor conviction, however, a suspended sentence is set based on the underlying wrongdoing — the conduct warranting the conviction. The suspended sentence does not bear any relation to the unforeseeable post-conviction conduct. The activation of the sentence, through the revocation of probation, results in the person being imprisoned for a term that relates to the original offense and, therefore, crosses the line of "actual imprisonment." *See Scott*, 440 U.S. at 373 ("[A]ctual imprisonment [is] the line defining the constitutional right to appointment of counsel."); *see also Argersinger*, 407 U.S. at 37 (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial" (footnote omitted)).

Reading *Argersinger* and *Scott* to preclude the activation of a suspended sentence is also consistent with the majority of appellate courts that have considered the issue. *See, e.g., United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990) (holding that "[s]ince imprisonment could not have been imposed on Foster at the conclusion of his trial . . . , imprisonment could not be imposed on Foster following revocation of his probation"); *Ramirez v. State*, 486 S.W.2d 373, 374 (Tex. Crim. App. 1972) (reversing order revoking probation on basis "that at the trial for the misdemeanor offense the appellant was not advised of his right to counsel and thus cannot be held to have waived his known right unless the State can show[ ] otherwise"); *Neilson v. Superior Court, Cochise County*, 767 P.2d 1185, 1186 (Ariz. Ct. App. 1988) (right to counsel violated where petitioner incarcerated on revocation of

probation when deprived of right to counsel at trial); *State v. DeRosa*, 633 A.2d 277, 279-80 (Va. 1993) (where indigent defendant is denied trial counsel, imprisonment cannot be imposed by revocation of probation); *Parks v. McClung*, 524 S.E.2d 718, 720 (Ga. 1999) ("[A] revoked probated sentence is nothing less than actual imprisonment."), *cert. denied*, 530 U.S. 1207 (2000); *see also, United States v. Ortega*, 94 F.3d 764, 770 (2nd Cir. 1996) (while finding it unnecessary to resolve issue definitively, court found "it significant that (so far as we [are] aware) every court of appeals that has considered the issue has concluded that a defendant convicted of a misdemeanor offense following a proceeding at which he was denied counsel may not later be sentenced to imprisonment for that offense, even though the sentence of imprisonment would be imposed for the defendant's violation of the terms of his probation").

B. Contrary to Professor Fried's Assertion, Contempt Is an Effective and Logical Tool for the Enforcement of Probation Orders.

The ability to impose a suspended sentence is important even if that sentence cannot be later activated. Indeed, in Alabama, to utilize probation — a tool recognized by this Court as important to the criminal justice system, *see Morrissey v. Brewer*, 408 U.S. 471, 477-79 (1972) — a trial court must first impose and then suspend a sentence of imprisonment. *See* ALA. CODE § 15-22-50 (1995) (stating that "[c]ircuit courts and district courts . . . may suspend execution of sentence and place on probation any person convicted of a crime in any court exercising

criminal jurisdiction"). A trial judge who does not conclude that a particular conviction warrants "actual imprisonment," but desires to retain jurisdiction over the defendant, must, therefore, impose a sentence of imprisonment, suspend that sentence, and place the defendant on probation. Reasoning consistent with that of Professor Fried — that a suspended sentence not subject to activation is no sentence at all — would deprive trial courts in Alabama of the ability to impose probation on uncounseled misdemeanor defendants.

Although a trial court may be precluded from enforcing the probation restrictions by activating a suspended sentence, it may enforce its probation orders through its contempt powers. "[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders. . . . " *Young v. United States*, 481 U.S. 787, 793 (1987). Indeed, this Court has recognized "[t]he ability to punish disobedience to judicial orders . . . as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796.

An Alabama trial court, like other state and federal courts, may utilize the power of contempt to "compel obedience to its judgments, orders and process. . . . " ALA. CODE § 12-1-7(3) (1995); (*see also*, Alabama Reply Brief at 11-12). The power of contempt provides an effective method of enforcing a criminal fine or restitution order which, according to the standard established in *Scott*, does not trigger the right to appointed counsel. *See Little v. State*, 693 So. 2d 30, 31 (Ala. Crim. App. 1997) (trial court possesses "authority to conduct . . . contempt proceedings . . . in its attempt to collect [an] unpaid fine"

imposed for defendant's misdemeanor crime). It is unclear how one could conclude that contempt is an acceptable method of ensuring the payment of a fine, such as that imposed in *Scott*, while, at the same time, deeming it inappropriate as an enforcement mechanism for probationary violations.

Professor Fried belittles the use of contempt powers with his assertion that "[w]e see no substantial difference between [pursuing a finding of contempt in] response to the defendant's breach and the remand to prison under the original sentence." (Fried Brief at 17) A contempt proceeding, however, focuses only on a defendant's post-conviction wrongdoing. Any sanction imposed following a finding of contempt is directly based on the post-conviction behavior. In contrast, because the post-conviction wrongdoing was then unforeseeable, the suspended or probated sentence was entered without any relation to that wrongdoing. Actually imprisoning a defendant for the underlying offense, no matter how long the initial incarceration date is delayed, violates the plain language of *Argersinger* and *Scott*. *See Argersinger*, 407 U.S. at 37 (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Scott*, 440 U.S. at 373 ("[A]ctual imprisonment [is] the line defining the constitutional right to appointment of counsel."). Moreover, activation of Shelton's suspended sentence would result in his "actual imprisonment" for thirty days. Clerk's Record 16. This fact alone refutes Professor Fried's contention that there is "no substantial difference between [contempt proceedings] and the remand to prison under

the original sentence." (Fried Brief at 17) The difference here is potentially an additional twenty-five days of incarceration. *See* ALA. CODE § 12-11-30(5) (1995) ("The circuit court may punish contempts by fines not exceeding one hundred dollars ($100) and by imprisonment not exceeding five days.").

Professor Fried's position would allow the activation of a suspended sentence for even a trivial violation of the probationary requirements. Under Fried's analysis, a defendant, whose sentence was originally suspended, could have that sentence activated for its duration one day following its entry for committing a minor traffic violation if, as here, the probation order prohibited the defendant from committing *any* further offense for a specified period. The severity of the sanction addressed in *Argersinger* and *Scott* was not based on the time of its enforcement, but on the nature of the penalty itself — "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment[.]" *Scott*, 440 U.S. at 373.

If subjected to contempt proceedings, Shelton would receive the full panoply of due process as required by this Court in *Cooke v. United States*, 267 U.S. 517, 537 (1925) (during prosecution of contempt, accused must be "advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation . . . includ[ing] the assistance of counsel, if requested, and the right to call witnesses to give testimony"); (*see also*, Alabama Reply Brief at 12). A court's contempt power is a flexible tool, providing a number of options to a judge when considering the most appropriate sanction for a defendant's breach. If Shelton refused to comply with "a

court's lawful . . . order, rule, or command[ ] [and] the dominant purpose of the contempt proceeding [was] to punish" him, the court could cite Shelton for criminal contempt. ALA. R. CRIM. P. 33.1(b)(3)(b). Whereas, if the "court's . . . order, rule, or command[ ] . . . by its nature [was] still capable of being complied with[,]" the court could cite Shelton for civil contempt. ALA. R. CRIM. P. 33.1(b)(4). Regardless of the violation, Shelton would be subject to similar punishments. Contrary to Professor Fried's intimation (Fried Brief at 17-18), there is nothing unusual about a trial court's use of contempt as a method of enforcing its orders.

III. THE CONSTITUTIONALITY OF SHELTON'S SENTENCE DOES NOT DEPEND ON THE RESOLUTION OF THE ISSUE ADDRESSED IN PROFESSOR FRIED'S BRIEF.

Professor Fried's brief confirms that Shelton's suspended sentence is clearly constitutional under *Argersinger* and *Scott*. Under Professor Fried's reading of *Argersinger* and *Scott*, the activation of Shelton's suspended sentence would not run afoul of the Constitution. *See* Fried Brief at 16 ("[T]he uncounseled conditional sentence is valid when imposed because it does not result in actual incarceration in that proceeding."). On the other hand, the State of Alabama reads *Argersinger* and *Scott* to preclude such a result. Under either interpretation, however — one allowing for revocation of probation and one prohibiting such a result — Alabama and Professor Fried agree that Shelton's suspended sentence is clearly constitutional.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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FOR ARGUMENT

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No. 00-1214

In The

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

vs.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S REPLY BRIEF TO BRIEF OF AMICUS CURIAE BY INVITATION OF THE COURT

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ARGUMENT

This brief is filed as a reply to the Brief of Amicus Curiae By Invitation of the Court, as allowed by the Court's order of October 18, 2001.

Amicus' brief begins with a brilliantly analytical and incisive description of the landscape of the problems presented by this case. However, when the brief undertakes to propose solutions to these problems with the argument that an uncounseled misdemeanant may be constitutionally incarcerated to serve a suspended sentence there are indications that, to vary a well-worn metaphor, it overlooks both the forest and the trees.

A. *Argersinger* and *Scott* Mean What They Say In Expressing Constitutional Standards.

The first contention in Amicus' brief is that the Respondent has relied on an overly broad reading of *Argersinger* and *Scott*. This contention is illustrated by quoting a number of passages from *Argersinger* and *Scott*, including the following:

> [N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. *Argersinger*, 407 U.S. at 37.
>
> The denial of the assistance of counsel will preclude the imposition of a jail sentence. Id. at 38.
>
> But in those that *end up* in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy. Id. at 40 (emphasis supplied).

Amicus' brief suggests that the Court did not really mean what it said when it wrote these words.

This contention, we submit, is unsound. It overlooks the fundamental purpose and goal of the Assistance of Counsel Clause of the Sixth Amendment and the decisions of this Court which have construed and applied it. It substitutes a short sighted, compartmentalized view of the right to counsel that turns a blind eye to reality and the true purpose of the Counsel Clause.

The *Argersinger* and *Scott* decisions are extensions of the *Powell-Johnson-Gideon* series of cases which had determined that, in the absence of waiver, counsel for persons accused of crimes is constitutionally required. This requirement is based on a recognition that our system of justice is an adversary system where the "guiding hand of counsel" is essential for a fair trial. See *Gideon vs. Wainwright*, 372 U.S. at 344 (1963). The significance of a fair trial, and its expected and hoped-for outcome, is that no innocent person will be convicted and punished for a crime. As the Court has recognized, the assistance of counsel is the best guarantee humanly possible that a fair trial will occur and that the innocent will not be convicted and punished. This is the goal of the Counsel Clause. The constitutionally operative time for counsel is at (and before) trial where guilt or innocence is determined. This is the concept the *Argersinger* and *Scott* cases were dealing with when the words quoted in Amicus' brief were written. They are not hollow words. They are profound statements of principles springing from the constitutional goal of preventing the conviction and imprisonment of the innocent.

The *Powell-Johnson-Gideon* series of cases established the ideal that in all criminal prosecutions a defendant have the benefit of counsel. The *Argersinger* and *Scott* cases were confronted with the issue of whether the ideal was an absolute mandate of the Constitution or whether the ideal should be tempered by practical considerations requiring some tradeoff between the ideal and the practical.

Argersinger and *Scott*, it seems, have already made the ultimate concession and reached the ultimate accommodation in response to that issue. That accommodation was that the Constitution can tolerate the possibility that an innocent person might be convicted in an uncounseled trial so long as the only punishment imposed is a monetary fine but that the Constitution cannot tolerate the possibility that an innocent person might be convicted in an uncounseled trial where the punishment imposed is incarceration, even of the slightest duration. This is what the *Argersinger* case meant when it said "no person, may be imprisoned for any offense . . . unless he was represented by counsel at his trial" and "the denial of the assistance of counsel will preclude the imposition of a jail sentence".

The principle that no uncounseled defendant may be imprisoned has no meaning if it does not apply to an uncounseled person incarcerated to serve a suspended sentence. Imprisonment is the same deprivation of liberty, which the Constitution will not tolerate as the result of an uncounseled trial, whether it commences immediately upon conviction or is delayed until probation is revoked.

The referenced quotations from the *Argersinger* and *Scott* opinions are not hyperbolic "throwaways". They are the product of a studied and deliberate effort which squeezed to the limit the constitutional tolerance for risks of conviction of the innocent. The conclusion is that imprisonment is not a tolerable risk. Amicus' argument seeks to expand the risk. It is inconsistent with both the language of *Argersinger* and *Scott* and the principles and precedents on which they rest, and should be rejected.

B. Conviction And Sentencing To A Suspended Sentence And Probation And Revocation Of Probation And Imposition Of The Suspended Sentence Are Not Separate Proceedings.

Amicus' brief argues that a separate determination should be made at each proceeding as to the constitutional requirements for counsel, relying on *Nichols vs. United States*, 511 U.S. 738 (1994) and *Gagnon vs. Scarpelli*, 411 U.S. 778 (1973). The attempt to compare *Nichols* and *Gagnon* to this case is an attempt to compare "incomparables". In *Nichols* two crimes were committed. Each warranted punishment. The first crime and the second crime are legitimately separate proceedings, and it is not illogical that a wall be built between them and each prosecution be separately considered, as *Nichols* did. The same is not true of probation revocation and imposition of a suspended sentence. It is the same prosecution and the same sentence for the same offense. The reimposed suspended sentence is incarceration for the original conviction. There is no first crime and second crime to be separated and separately considered.

Gagnon dealt with a different issue altogether, the right to counsel at probation revocation hearings. The right to counsel at a probation revocation hearing is not closely akin to the right to counsel at an original trial. At a probation revocation hearing guilt has already been established. It is the guilt determination stage where the guiding hand of counsel mandated by the Sixth Amendment operates ("Assistance of Counsel in his defence"). The right of counsel at probation revocation hearings, as Amicus' brief advocates at pages 23-24, is beyond the scope of this case.

C. *Argersinger* And *Scott* Dealt With The Threat Of Incarceration Faced By An Untried Accused, Not A Convicted Misdemeanant.

The argument made under II-C of Amicus' brief is that a suspended sentence and probation are only a threat of incarceration, which the *Argersinger* and *Scott* cases rejected as a basis for appointment of counsel. This argument overlooks the facts of those cases and the issues raised and the contentions presented in them. The issue in both cases was counsel at trial, where guilt is determined. A contention in both cases was that an untried misdemeanor defendant charged with an offense for which a jail sentence was an authorized penalty faced a threat of imprisonment and should be appointed counsel. It was this threat of imprisonment, not a suspended sentence after an adjudication of guilt, that the *Argersinger* and *Scott* cases rejected as a predicate for appointing counsel.

The threat of imprisonment facing an untried accused is far different from the threat of imprisonment facing a convicted misdemeanant who has received a suspended sentence. After conviction and the imposition of a suspended sentence it is too late to afford counsel for the guilt determining process, the trial. The threat of imprisonment of an untried accused will materialize only if guilt is established beyond a reasonable doubt in a trial process where there are numerous safeguards to protect the innocent. There may be a right to jury trial, as there would have been in the Respondent's case. See ALA. CONST. § 6 (1901); ALA. R. CRIM. P. 18.1(a) (1975). Not so with a convicted misdemeanant who has received a suspended sentence and probation. Probation can be revoked for any number of reasons other than the conviction for a later committed offense. See, e.g., 18 U.S.C. §§ 3563, 3565; ALA. CODE §§ 15-22-52, 15-22-54 (1975). Proof of a probation violation need not be beyond a reasonable doubt. See, e.g., *Powell vs. State*, 485 So.2d 379, 380 (Ala. 1986). There is no jury trial. The right of counsel at a probation revocation hearing is not assured. See *Gagnon vs. Scarpelli, supra*. Consequently, the attempt to compare the threat of imprisonment facing an accused and the threat of imprisonment facing a convicted misdemeanant with a suspended sentence is not an equal comparison.

D. *Nichols* And *Gagnon* Are Not Analogous To This Case

Amicus' brief argues, with putative reliance on *Nichols* and *Gagnon*, that incarceration to serve a suspended sentence following probation revocation is the product of a separate proceeding from the proceeding in which the suspended sentence was imposed. As previously discussed, this specious comparison and this attempt to fragment the same case into independent components does not serve the Sixth Amendment's purpose of preventing the conviction and incarceration of the innocent. Revocation of probation and incarceration to serve a previously suspended sentence of someone denied counsel at trial is incarceration of one not afforded the guiding hand of counsel when his guilt was determined. Such a person "ends up" incarcerated only because he received a suspended sentence at an uncounseled trial. Had such a person not been convicted at an uncounseled trial he or she would not "end up" being incarcerated to serve this sentence purely because of the conduct which resulted in probation revocation. This is incarceration of a person found guilty in an uncounseled trial, and no strained argument can separate this incarceration from the uncounseled trial.

E. Practical Considerations Do Not Justify Denial Of Constitutional Rights.

The argument that only a small percentage of misdemeanants with suspended sentences end up being actually incarcerated (a premise which is somewhat lacking in a factual basis) misses the point of the precedents which

have dealt with the Counsel Clause. The undeniable message of these cases is that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial" (406 U.S. at 37) and that "the denial of the assistance of counsel will preclude the imposition of a jail sentence" (407 U.S. at 38). It makes no exceptions. As previously discussed, the *Argersinger* and *Scott* cases apparently have firmly decided that the Constitution will not tolerate any imprisonment of uncounseled defendants, regardless of the number and regardless of the costs.

The argument that the costs of providing counsel will be burdensome to States is an argument that has been rejected. See *Mayor vs. City of Chicago*, 404 U.S. 189, 147-48 (1971). The brief of Amici Texas et al. seems to suggest that most States already supply counsel in cases where a suspended sentence could be imposed, so few states may be affected. In these few States judges trying misdemeanor cases for which a jail sentence is an authorized penalty are already required by *Argersinger* to make a pre-trial determination about whether a jail sentence will be imposed. No additional judicial effort will be required to include suspended sentences in the thought and decision making process that must be made in every such misdemeanor case at the present time. In the absence of data to support it, the argument of an intolerable financial burden should be rejected as a reason for denying a basic right.

CONCLUSION

For the reasons discussed, Respondent requests the Court to deny the petition.

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ARGUMENT

The State of Alabama respectfully submits this Brief in response to the brief filed by Professor Charles Fried, as *amicus curiae*. In compliance with the directive of the Court, Professor Fried advocates the following position: "where counsel is not afforded to an indigent defendant, the Constitution of the United States does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked." Consistent with Professor Fried's position, Alabama has argued in its opening and reply briefs that the imposition of a suspended or probationary sentence, following an uncounseled misdemeanor conviction, does not violate the text of the Sixth Amendment, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), or *Scott v. Illinois*, 440 U.S. 367 (1979). Unlike Alabama in its initial reply brief, however, Professor Fried argues an expansive reading of *Argersinger* and *Scott*, which would permit activation of an uncounseled misdemeanant's suspended sentence, because imprisonment does not immediately occur on imposition of the sentence. Professor Fried's reading of *Argersinger* and *Scott* is plausible, fully consistent with the text of the Sixth Amendment, and one that Alabama would welcome. In the light of the language and reasoning contained in *Argersinger* and *Scott*, however, Alabama maintains that activation of a probated sentence for an uncounseled misdemeanant is precluded. Alabama also maintains that contempt is an effective and logical tool for the enforcement of probation orders.

I. FRIED'S INTERPRETATION OF *ARGERSINGER* AND *SCOTT* IS PLAUSIBLE AND CONSISTENT WITH THE TEXT OF THE SIXTH AMENDMENT.

In his brief, Professor Fried focuses primarily on the question whether the revocation of Shelton's probation and later imprisonment would violate the Sixth Amendment. This question is, however, speculative based on the procedural posture of this case. As explained in Alabama's initial reply brief, no effort has been made at any time to revoke Shelton's probation and incarcerate him. (Alabama Reply Brief at 9) Any evaluation regarding the constitutionality of such an action is, therefore, premature. Should this Court choose to address the issue, however, Professor Fried's proposed reading of *Argersinger* and *Scott* is plausible and, Alabama admits, more consistent with the text and original meaning of the Sixth Amendment than the position espoused in Alabama's initial reply brief. (*See* Alabama Reply Brief at 9.)

A. Professor Fried's Reading Of *Argersinger* and *Scott* Is Closer to the Original Meaning of the Sixth Amendment.

Despite expansive judicial interpretations of the right to counsel, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott v. Illinois*, 440 U.S. at 370, *citing* W. Beaney, *The Right to Counsel in American Courts* 27-30 (1955). The Sixth Amendment did not require appointed counsel in any

misdemeanor proceeding, including those resulting in imprisonment. Indeed, *Amici* Texas, *et al.*, have provided an extensive explanation of the history of the provision, conclusively demonstrating that, "as enacted, [it] provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel." (Texas, *et al.* Brief at 14-21) This Court recognized as much in its first opinion addressing the scope of the Sixth Amendment right to counsel. *See United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (holding that "[t]here is . . . no general obligation on the part of the government . . . to . . . retain counsel for defendants"). Professor Fried's contention that a suspended sentence, imposed following an uncounseled misdemeanor conviction, may be constitutionally activated is, therefore, entirely consistent with the text of the Sixth Amendment.

Moreover, Professor Fried presents a plausible reading of *Argersinger* and *Scott*. In *Argersinger*, this Court held that an indigent defendant, in a misdemeanor case, is entitled to appointed counsel "where imprisonment actually occurs." *Argersinger*, 407 U.S. at 38. *Scott* reaffirmed "the central premise of *Argersinger*[,]" holding that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. Professor Fried contends that imprisonment following activation of a suspended sentence does not violate *Argersinger* and *Scott* because the imprisonment does not occur immediately on imposition of the sentence. Furthermore, if imprisonment does result, it results, not from the underlying misdemeanor conviction, but from a subsequent probationary violation. Therefore, because actual imprisonment does not occur as a result of the conviction,

but instead as a result of a defendant's own actions resulting in a revocation of probation, the right to counsel is not implicated. This reading of *Argersinger* and *Scott* is consistent with the text of the Sixth Amendment and is one to which Alabama would not object. As is discussed in part II of this reply brief, however, it is not the most plausible reading of those decisions.

B. Professor Fried's Reading of *Argersinger* and *Scott* Would Give the States Greater Flexibility in Dealing with Misdemeanor Defendants Who Violate the Terms of Their Probation.

Reading *Argersinger* and *Scott* to preclude the activation of a suspended sentence obviously restricts the manner in which a sentencing authority can punish a defendant who violates the terms of his probation. Absent the option of activating a suspended sentence, a trial court must search for other remedies to enforce the terms of probation, such as the imposition of supervised probation, requiring regular meetings with a probation officer, prohibiting contact with the victim, ordering the payment of additional fines, and the utilization of its contempt powers. All of these methods of ensuring compliance with the terms of probation require the expenditure of additional time and resources. A broader reading of *Argersinger* and *Scott* to allow activation of the suspended sentence, even where counsel is not provided at trial, would provide greater flexibility in dealing with the misdemeanor defendant who violates the terms of his or her probation. It would also plainly provide a defendant with significant motivation to comply with the probation orders of the court.

II. DESPITE THE PLAUSIBILITY OF PROFESSOR FRIED'S INTERPRETATION, ALABAMA'S READING OF *ARGERSINGER* AND *SCOTT* IS THAT ACTIVATION OF A SUSPENDED SENTENCE IN A MISDEMEANOR CASE IS PRECLUDED WHEN THE DEFENDANT WAS UNCOUNSELED AT TRIAL.

As reflected in its initial reply brief, the State of Alabama has read *Argersinger* and *Scott* to preclude the activation of a suspended sentence imposed following an uncounseled misdemeanor conviction. (*See* Alabama Reply Brief at 9) (stating that "there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation"). Plainly, such an action would not violate the Sixth Amendment right to counsel as originally adopted. By its own admission, however, this Court has "departed from the literal meaning of the Sixth Amendment," *Scott*, 440 U.S. at 372, "expanded the language . . . well beyond its obvious meaning," *Nichols v. United States*, 511 U.S. 738, 746 (1994), and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. The line has, therefore, been "drawn between criminal proceedings that result[ ] in imprisonment, and those that [do] not." *Nichols*, 511 U.S. at 746, *citing Scott*, 440 U.S. at 372. Therefore, the question presented is whether imprisonment following the revocation of probation, as opposed to imprisonment immediately following an uncounseled misdemeanor conviction, constitutes "actual imprisonment" within the meaning of *Argersinger* and *Scott*. The most plausible reading of

Argersinger and *Scott* precludes either form of imprisonment. A trial court may still, however, enforce its probation orders in a variety of ways, including its inherent powers of contempt.

A. Professor Fried's Position, While Plausible, Is at Odds With Some of the Language and Reasoning of *Argersinger* and *Scott*.

Professor Fried reads the rule of "actual imprisonment" to apply only to "those misdemeanor defendants whose cases result in *immediate* actual imprisonment." (Fried Brief at 13) (emphasis added). In adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel," however, this Court did not state, that, to fall under the ruling, the incarceration must be immediate. *Scott*, 440 U.S. at 373. Moreover, *Argersinger* and *Scott* address the *final* disposition of misdemeanor proceedings, not merely the immediate consequence of a trial. *See Argersinger*, 407 U.S. at 40 (extending the right to appointed counsel to those misdemeanors "that *end up* in the actual deprivation of a person's liberty") (emphasis added); *Scott*, 440 U.S. at 373 (relying on the references in *Argersinger* "to trials 'where an accused is deprived of his liberty' " and "to 'a case that actually *leads to* imprisonment even for a brief period' ") (emphasis added). Indeed, the rule announced in *Argersinger* requires a trial judge to consider the final disposition of the proceedings even before their commencement. *See Argersinger*, 407 U.S. at 40 ("Under the rule we announce today, every judge . . . will have a measure of the seriousness and gravity of the offense and

therefore know when to name a lawyer to represent the accused before the trial starts.").

Professor Fried relies on *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), to support his reading of *Argersinger* and *Scott*. (Fried Brief at 11) *Nichols* and *Gagnon* are, however, distinguishable. In both *Nichols* and *Gagnon*, unlike here, the defendant was imprisoned following a felony trial in which the defendant had a right to counsel, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Professor Fried's position is additionally based upon a contention that, "[b]ecause Shelton's sentence was valid at the time it was imposed, Alabama may revoke the conditional sentence without violating Shelton's constitutional rights." (Fried Brief at 14) It is difficult, however, to reconcile this contention — that a constitutionally valid sentence remains so even after the very basis of its validity is removed — with simple logic. Under *Argersinger* and *Scott*, Shelton's sentence of imprisonment was constitutionally valid when entered *only* because it was, in fact, *not imposed*; it was suspended. A suspended sentence of imprisonment does not violate the holdings of *Argersinger* and *Scott* precisely because it does not result in "actual imprisonment."

Professor Fried asserts that the revocation of probation and accompanying activation of a suspended sentence is a proceeding apart from that resulting in the conviction. (Fried Brief at 12-13) Again, relying on *Nichols* and *Gagnon*, he contends that "the extent of the right to appointed counsel must be determined separately for

each proceeding." (Fried Brief at 12) Following a misdemeanor conviction, however, a suspended sentence is set based on the underlying wrongdoing — the conduct warranting the conviction. The suspended sentence does not bear any relation to the unforeseeable post-conviction conduct. The activation of the sentence, through the revocation of probation, results in the person being imprisoned for a term that relates to the original offense and, therefore, crosses the line of "actual imprisonment." *See Scott*, 440 U.S. at 373 ("[A]ctual imprisonment [is] the line defining the constitutional right to appointment of counsel."); *see also Argersinger*, 407 U.S. at 37 (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial" (footnote omitted)).

Reading *Argersinger* and *Scott* to preclude the activation of a suspended sentence is also consistent with the majority of appellate courts that have considered the issue. *See, e.g., United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990) (holding that "[s]ince imprisonment could not have been imposed on Foster at the conclusion of his trial . . . , imprisonment could not be imposed on Foster following revocation of his probation"); *Ramirez v. State*, 486 S.W.2d 373, 374 (Tex. Crim. App. 1972) (reversing order revoking probation on basis "that at the trial for the misdemeanor offense the appellant was not advised of his right to counsel and thus cannot be held to have waived his known right unless the State can show[ ] otherwise"); *Neilson v. Superior Court, Cochise County*, 767 P.2d 1185, 1186 (Ariz. Ct. App. 1988) (right to counsel violated where petitioner incarcerated on revocation of

probation when deprived of right to counsel at trial); *State v. DeRosa*, 633 A.2d 277, 279-80 (Va. 1993) (where indigent defendant is denied trial counsel, imprisonment cannot be imposed by revocation of probation); *Parks v. McClung*, 524 S.E.2d 718, 720 (Ga. 1999) ("[A] revoked probated sentence is nothing less than actual imprisonment."), *cert. denied*, 530 U.S. 1207 (2000); *see also, United States v. Ortega*, 94 F.3d 764, 770 (2nd Cir. 1996) (while finding it unnecessary to resolve issue definitively, court found "it significant that (so far as we [are] aware) every court of appeals that has considered the issue has concluded that a defendant convicted of a misdemeanor offense following a proceeding at which he was denied counsel may not later be sentenced to imprisonment for that offense, even though the sentence of imprisonment would be imposed for the defendant's violation of the terms of his probation").

B. Contrary to Professor Fried's Assertion, Contempt Is an Effective and Logical Tool for the Enforcement of Probation Orders.

The ability to impose a suspended sentence is important even if that sentence cannot be later activated. Indeed, in Alabama, to utilize probation — a tool recognized by this Court as important to the criminal justice system, *see Morrissey v. Brewer*, 408 U.S. 471, 477-79 (1972) — a trial court must first impose and then suspend a sentence of imprisonment. *See* ALA. CODE § 15-22-50 (1995) (stating that "[c]ircuit courts and district courts . . . may suspend execution of sentence and place on probation any person convicted of a crime in any court exercising

criminal jurisdiction"). A trial judge who does not conclude that a particular conviction warrants "actual imprisonment," but desires to retain jurisdiction over the defendant, must, therefore, impose a sentence of imprisonment, suspend that sentence, and place the defendant on probation. Reasoning consistent with that of Professor Fried — that a suspended sentence not subject to activation is no sentence at all — would deprive trial courts in Alabama of the ability to impose probation on uncounseled misdemeanor defendants.

Although a trial court may be precluded from enforcing the probation restrictions by activating a suspended sentence, it may enforce its probation orders through its contempt powers. "[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders. . . . " *Young v. United States*, 481 U.S. 787, 793 (1987). Indeed, this Court has recognized "[t]he ability to punish disobedience to judicial orders . . . as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796.

An Alabama trial court, like other state and federal courts, may utilize the power of contempt to "compel obedience to its judgments, orders and process. . . . " ALA. CODE § 12-1-7(3) (1995); (*see also*, Alabama Reply Brief at 11-12). The power of contempt provides an effective method of enforcing a criminal fine or restitution order which, according to the standard established in *Scott*, does not trigger the right to appointed counsel. *See Little v. State*, 693 So. 2d 30, 31 (Ala. Crim. App. 1997) (trial court possesses "authority to conduct . . . contempt proceedings . . . in its attempt to collect [an] unpaid fine"

imposed for defendant's misdemeanor crime). It is unclear how one could conclude that contempt is an acceptable method of ensuring the payment of a fine, such as that imposed in *Scott*, while, at the same time, deeming it inappropriate as an enforcement mechanism for probationary violations.

Professor Fried belittles the use of contempt powers with his assertion that "[w]e see no substantial difference between [pursuing a finding of contempt in] response to the defendant's breach and the remand to prison under the original sentence." (Fried Brief at 17) A contempt proceeding, however, focuses only on a defendant's post-conviction wrongdoing. Any sanction imposed following a finding of contempt is directly based on the post-conviction behavior. In contrast, because the post-conviction wrongdoing was then unforeseeable, the suspended or probated sentence was entered without any relation to that wrongdoing. Actually imprisoning a defendant for the underlying offense, no matter how long the initial incarceration date is delayed, violates the plain language of *Argersinger* and *Scott*. *See Argersinger*, 407 U.S. at 37 (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Scott*, 440 U.S. at 373 ("[A]ctual imprisonment [is] the line defining the constitutional right to appointment of counsel."). Moreover, activation of Shelton's suspended sentence would result in his "actual imprisonment" for thirty days. Clerk's Record 16. This fact alone refutes Professor Fried's contention that there is "no substantial difference between [contempt proceedings] and the remand to prison under

the original sentence." (Fried Brief at 17) The difference here is potentially an additional twenty-five days of incarceration. *See* ALA. CODE § 12-11-30(5) (1995) ("The circuit court may punish contempts by fines not exceeding one hundred dollars ($100) and by imprisonment not exceeding five days.").

Professor Fried's position would allow the activation of a suspended sentence for even a trivial violation of the probationary requirements. Under Fried's analysis, a defendant, whose sentence was originally suspended, could have that sentence activated for its duration one day following its entry for committing a minor traffic violation if, as here, the probation order prohibited the defendant from committing *any* further offense for a specified period. The severity of the sanction addressed in *Argersinger* and *Scott* was not based on the time of its enforcement, but on the nature of the penalty itself — "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment[.]" *Scott*, 440 U.S. at 373.

If subjected to contempt proceedings, Shelton would receive the full panoply of due process as required by this Court in *Cooke v. United States*, 267 U.S. 517, 537 (1925) (during prosecution of contempt, accused must be "advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation . . . includ[ing] the assistance of counsel, if requested, and the right to call witnesses to give testimony"); (*see also*, Alabama Reply Brief at 12). A court's contempt power is a flexible tool, providing a number of options to a judge when considering the most appropriate sanction for a defendant's breach. If Shelton refused to comply with "a

court's lawful . . . order, rule, or command[ ] [and] the dominant purpose of the contempt proceeding [was] to punish" him, the court could cite Shelton for criminal contempt. ALA. R. CRIM. P. 33.1(b)(3)(b). Whereas, if the "court's . . . order, rule, or command[ ] . . . by its nature [was] still capable of being complied with[,]" the court could cite Shelton for civil contempt. ALA. R. CRIM. P. 33.1(b)(4). Regardless of the violation, Shelton would be subject to similar punishments. Contrary to Professor Fried's intimation (Fried Brief at 17-18), there is nothing unusual about a trial court's use of contempt as a method of enforcing its orders.

III. THE CONSTITUTIONALITY OF SHELTON'S SENTENCE DOES NOT DEPEND ON THE RESOLUTION OF THE ISSUE ADDRESSED IN PROFESSOR FRIED'S BRIEF.

Professor Fried's brief confirms that Shelton's suspended sentence is clearly constitutional under *Argersinger* and *Scott*. Under Professor Fried's reading of *Argersinger* and *Scott*, the activation of Shelton's suspended sentence would not run afoul of the Constitution. *See* Fried Brief at 16 ("[T]he uncounseled conditional sentence is valid when imposed because it does not result in actual incarceration in that proceeding."). On the other hand, the State of Alabama reads *Argersinger* and *Scott* to preclude such a result. Under either interpretation, however — one allowing for revocation of probation and one prohibiting such a result — Alabama and Professor Fried agree that Shelton's suspended sentence is clearly constitutional.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE STATES OF TEXAS, OHIO, MONTANA, NEBRASKA, DELAWARE, LOUISIANA, AND VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the right to State-appointed counsel, which this Court has recognized under the Sixth Amendment but has limited to cases of "actual imprisonment," be extended to misdemeanor offenders who are never imprisoned but instead receive a suspended sentence?

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are States[1] that oppose further expansion of the federal right to State-appointed counsel that was first adopted, as to felony cases, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). As a matter of State law, some States provide appointed counsel to indigent defendants in all or virtually all misdemeanor cases. Others provide such a right only in relatively serious misdemeanor cases, such as those in which the maximum potential punishment includes imprisonment greater than a certain duration. Still others provide State-appointed counsel to misdemeanor defendants only when required to do so by this Court's decisions in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, 440 U.S. 367 (1979). Those decisions hold that a misdemeanor defendant has a Sixth Amendment right to appointed counsel only when the proceeding results in "actual imprisonment," not when it results in a lesser punishment such as a fine, probation or a mere "threat of imprisonment." *Id.* at 373.

Regardless of the prevailing practices in their own States, *amici* believe that, aside from these established federal parameters, the right to appointed counsel in State proceedings should be determined as a matter of State law, not as a matter of federal constitutional right. Recent statistics from the U.S. Department of Justice indicate that the States already pay well over $1.2 billion annually for appointed counsel. The States, through their elected representatives, should determine whether to spend additional State funds on appointed counsel rather than on other pressing governmental priorities. *Amici* also believe it would be unseemly and unwise to require them, as a matter of federal law, to provide counsel to indigent defendants for

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[1] As States, *amici* are not required to seek leave to file an *amicus curiae* brief. *See* Sup. Ct. R. 37.4.

misdemeanor cases in which most non-indigent defendants would not even bother to retain a lawyer. See *Argersinger*, 407 U.S. at 50 (Powell, J., concurring in result).

Extending the right to State-appointed counsel could have other harmful effects on *amici* and their citizens. For example, as Justice Powell noted in his *Argersinger* concurrence, an expanded right to State-appointed counsel likely would produce "over lawyering" of relatively minor cases, thereby "stretching out . . . the process with consequent increased costs to the public." *Id.* at 58-59 (Powell, J., concurring in result). Such an expansion, moreover, could require the States to provide trained prosecutors for cases that are now effectively prosecuted by police and other non-lawyers. *Id.* Finally, invalidating suspended sentences on the ground that the defendants lacked appointed counsel would interfere with the operation of State probation systems and recidivism rules, thereby subjecting the citizens of some States to an increased risk of crime by repeat offenders.

For these reasons, and others discussed below, *amici* oppose the effort by the Supreme Court of Alabama in this case, and a few courts in other cases, to extend the federal right to State-appointed counsel to misdemeanor defendants who are never imprisoned, but who receive suspended or conditional sentences.

SUMMARY OF ARGUMENT

In *Scott*, this Court reiterated the holding of *Argersinger* that, under the Sixth Amendment (as applied to the States through the Fourteenth Amendent), "incarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 372-73 (1979). The Court further explained that "the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the

mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373.

Notwithstanding this "bright line between imprisonment and lesser criminal penalties," *Nichols* v. *United States*, 511 U.S. 738, 750 (1994) (Souter, J., concurring in judgment), the Supreme Court of Alabama and a few other courts have held that *Scott* also makes it unconstitutional for trial courts to impose suspended or conditional sentences in misdemeanor cases involving uncounseled defendants. See Pet. App. 8-11; 34 (collecting cases). In so holding, these decisions have seized upon the statement in *Scott* that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 374 (emphasis added). Reasoning that a suspended or conditional sentence is still a "sentence of imprisonment," these decisions hold that such sentences violate the Sixth Amendment even when no incarceration results.

But this reading of *Scott*—like the interpretation of the Sixth Amendment on which it rests—is patently incorrect.

I. First, it is contrary to this Court's decisions interpreting that Amendment, especially *Argersinger* and *Scott* themselves. This Court's earliest known decision expressly interpreting the Sixth Amendment right to counsel concluded that, although the Sixth Amendment guarantees a defendant's right to retain counsel on his own, it did not create a "general obligation on the part of the *government* . . . to . . . retain counsel for defendants." *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891) (emphasis added), *on rehearing on another point*, 140 U.S. 199 (1891).

To be sure, the Court later departed from this understanding when it concluded that the Sixth and Fourteenth Amendments impose such an obligation with respect to felony proceedings.

See *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) (federal trials); *Gideon* v. *Wainwright*, 372 U.S. 335, 339 (1963) (State trials). And this right was, of course, extended to certain misdemeanors in *Argersinger*. But *Argersinger* and its progeny make perfectly clear that the right so recognized is limited to misdemeanor cases that "*end up* in the *actual* deprivation of a person's liberty." 407 U.S. at 40 (emphases added).

Nothing in *Scott* purports to expand the class of misdemeanors that qualify for State-appointed counsel. Indeed, the defendant in *Scott* was neither sentenced to nor served any term of imprisonment. While the statute he was accused of violating authorized both a fine and a term of imprisonment, he was only sentenced to pay a fine. Accordingly, the Court's reference to a defendant's being "sentenced to a term of imprisonment" is properly read as an effort to distinguish a fine from an actual imprisonment, not as an effort to broaden the holding of *Argersinger*. As ably shown by petitioner, moreover, this conclusion is consistent with the clear weight of authority in other courts, both State and federal.

II. Even if *Argersinger* and *Scott* did not squarely foreclose the Supreme Court of Alabama's extension of the right to appointed counsel, such an extension should be rejected in light of the language and history of the Sixth Amendment. The Amendment's plain language—providing that an "accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"—suggests no right to counsel funded or provided by the government. For that and other reasons, as the *Scott* Court noted, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused . . . to *employ* a lawyer to assist in his defense." 440 U.S. at 370 (emphasis added) (citing William M. Beaney, *The Right to Counsel in American Courts* 27-30 (Greenwood 1972) (1955)).

Indeed, as the Court explained in *Argersinger*, the fundamental problem addressed by the Sixth Amendment's right to counsel provision had nothing to do with the inability of indigent defendants to retain counsel. Rather, the problem was that under English common law, "'parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel'" while "'a person charged with treason or felony was denied the aid of counsel,'" even when he was willing and able to retain one. 407 U.S. at 30. Careful examination of the pertinent historical materials confirms that the Sixth Amendment's original meaning was limited to filling that particular gap.

Perhaps the most instructive piece of historical evidence is a statute passed by the first Congress in 1790, almost contemporaneously with its passage of the Bill of Rights. That statute provided that a defendant "indicted of treason" or "other capital offenses"—and no other crimes—would be entitled to have "*assign*[*ed*] to such person such counsel, not exceeding two, as such person shall desire." Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118. If the first Congress had interpreted the Sixth Amendment as providing a right to *appointed* counsel in "all criminal prosecutions," this statute would have been at once redundant and under-inclusive. Accordingly, its passage clearly indicates that the first Congress interpreted the Sixth Amendment as providing only a right to retained counsel, paid for by the defendant himself.

But even if the Sixth Amendment could have been viewed as having a broader meaning, its reach could not possibly have extended to misdemeanor cases, particularly those in which no incarceration was actually imposed. The historical evidence suggests that only a few States gave any criminal defendants a right to appointed counsel. Even then, that right extended only to those accused of felonies, and usually only to capital offenses. The "right to counsel" in the proposed Sixth Amendment would doubtless have elicited a public outcry, or at least significant debate, if it had been viewed as

creating a right broader than that created by even the most expansive State statutes. And, of course, the fact that some States provided some right to appointed counsel while other States did not shows that the Framers knew how to create such a right if they wished to do so.

III. This Court should also refuse to expand the right to State-appointed counsel beyond that recognized in *Argersinger* and *Scott* because doing so would impose significant burdens on the States without any assurance of significant additional benefit to misdemeanor defendants. As outlined above, such an expansion would perversely require that State resources be used to provide counsel in cases where most defendants would not even obtain counsel for themselves. It would increase burdens on already over-burdened State courts and prosecutors' offices throughout the Nation. And it would jeopardize the operation of State probation policies and recidivism statutes, thereby putting the public safety at risk.

In short, this Court should reject the expansion of the right to appointed counsel countenanced by the court below, and should enforce the limitations already established in *Argersinger* and *Scott*.

STATEMENT OF FACTS

Amici adopt the statement of facts presented in the petitioner's brief.

ARGUMENT

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. At bottom, the question in this case is whether, as the Supreme Court of Alabama held, this provision provides a right to State-appointed counsel in a misdemeanor proceeding that results in

a suspended or conditional sentence of incarceration, but no actual imprisonment. As explained below, there is no basis for such a right in this Court's decisions, in the Amendment's text and history, or in sound public policy.

I. THIS COURT'S "ACTUAL IMPRISONMENT" JURISPRUDENCE SQUARELY FORECLOSES EXTENDING THE FEDERAL RIGHT TO STATE-APPOINTED COUNSEL TO MISDEMEANOR CASES THAT RESULT IN SUSPENDED SENTENCES BUT NO JAIL TIME.

Although this Court's reading of the Sixth Amendment has, since the 1930s, departed from the Amendment's strict text and history, and indeed from this Court's own early interpretation (see *infra*, Section II), the Court consistently has held that the right to State-appointed counsel in misdemeanor cases is limited. And the Court consistently has ruled that "the line should be drawn between criminal proceedings that *resulted in* imprisonment, and those that did not." *Nichols* v. *United States*, 511 U.S. 738, 746 (1994) (citing *Scott* v. *Illinois*, 440 U.S. 367, 372 (1979)) (emphasis added).

The Supreme Court of Alabama crossed over this line in holding that a suspended sentence triggers the right to State-appointed counsel even though it does not "result in imprisonment." The court justified its holding by attempting to read this Court's opinion in *Scott* as though it were a statute. Cf., *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("the language of an opinion is not always to be parsed as though we were dealing with language of a statute"); *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515 (1993) (criticizing the practice of "dissect[ing] the sentences of the United States Reports as though they were the United States Code"). Specifically, the Alabama court pointed to the statement that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 373-74 (1979)

(emphasis added); see Pet. App. 32. The court below then reasoned that, because a suspended or conditional sentence is still a "'sentence of imprisonment,'" such a sentence is invalid under *Scott* even though it does not actually result in imprisonment. See Pet. App. 34-35. But this conclusion, based on one isolated sentence in the *Scott* opinion, is impossible to square with this Court's precedents.

1. To begin with, the lower court's interpretation of *Scott* is flatly contrary to *Argersinger*, which both established and delimited the right to State-appointed counsel in misdemeanor cases. In *Argersinger*, the Court held that absent a waiver, "no person may *be imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972) (emphasis added).[2] The Court further emphasized that "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that *no imprisonment may be imposed*, even though local law permits it, unless the accused is represented by counsel." *Id.* at 40 (emphasis added).

The Court thus recognized the apparent oddity in the fact that the right to appointed counsel, which must be provided at the outset of the criminal proceedings, is judged by reference to the ultimate disposition of the case. But, as the Court noted, this approach essentially puts the issue in the control of the State and the court, and forces them to live with the choice they make prior to trial. If the State believes that the offense potentially warrants a prison sentence, or if the court wishes to preserve the option of imposing an actual jail term, the State must provide counsel. If, however, both the State and the court expect a penalty not involving incarceration, the indigent defendant is fully protected: He can retain counsel if he wishes but, given the unavailability of prison time as a

[2] In that case, the defendant was sentenced to serve 90 days in jail. *Argersinger* v. *Hamlin*, 407 U.S. 25, 26 (1972).

sentencing option, it is almost certain that he will proceed as any other defendant ordinarily would—without the assistance of counsel.

Accordingly, the Court specifically acknowledged in *Argersinger* that "[t]he run of misdemeanors will not be affected" by its decision. *Id.* That was because, under the Court's holding, only "those that *end up* in *actual deprivation* of a person's liberty" will trigger the right to appointed counsel. *Id.* (emphases added). Thus, for example, according to the Court, "[t]he fact that traffic charges technically fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class . . . where imprisonment actually occurs," thereby triggering the right to State-funded representation in that inevitably large number of cases. *Id.* at 38. The court below neither cited nor discussed these key portions of the *Argersinger* opinion.

Obviously, a misdemeanor case that produces a suspended or probated sentence does not ordinarily "end up" in any "actual deprivation of a person's liberty." Nor, as in this case, does it ordinarily create a situation in which "imprisonment actually occurs." The decision of the court below thus cannot be squared with *Argersinger*'s holding or its rationale.

2. The same is true of *Scott* itself. There, the Court emphasized that imprisonment—the starkest deprivation of personal liberty—is distinct from lesser deprivations of liberty and property and warrants particular Sixth Amendment protection. *Scott* involved a misdemeanor conviction in which the offender was sentenced to pay a fine. No incarceration was imposed, although it would have been permitted by the governing State statute. The Court rejected the defendant's argument that counsel is mandated whenever a statute authorizes the imposition of imprisonment, even though none is, in fact, imposed. *Scott*, 440 U.S. at 368-69. The Court also rejected the contention that lesser deprivations

of liberty and property trigger a right to State-appointed counsel. *Id.* at 372-73.

In so doing, the Court reviewed *Argersinger* at some length. The Court emphasized that *Argersinger* had "conclu[ded] that *incarceration* [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense." *Id.* (emphasis added). The Court also pointed out that the *Argersinger* opinion "repeatedly referred to trials 'where an accused is deprived of his liberty,' and to 'a case that actually leads to imprisonment even for a brief period.'" *Id.* at 373 (citation omitted) (quoting *Argersinger*, 407 U.S. at 32, 33). The Court further explained that "[e]ven were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.*

This distinction—between "actual imprisonment" and a "mere threat of imprisonment"—forecloses the Supreme Court of Alabama's view that a suspended sentence triggers the right to State-appointed counsel. Just as the mere *possibility* of a court's imposing a statutorily permitted term of incarceration constituted a "mere threat" of imprisonment in *Scott*, so too does the possibility that a suspended sentence will ultimately result in incarceration. In both cases, incarceration is still a "threat." It is not "actual incarceration."[3]

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[3] Other courts have held that the "mere threat of imprisonment" language in *Scott*, "can only be read to include suspended sentences." *See, e.g., United States* v. *Smith*, No. 94-5627, 1995 WL 314892, at **2 (6th Cir. May 23, 1995) (per curiam) (unpublished disposition), *cert. denied*, 516 U.S. 897 (1995); *cf.* Sheldon Krantz et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* 30 (1976) ("A suspended sentence places no conditions upon a defendant and, if the sentence is never imposed, it will have no effect" on a defendant's liberty; "[a]s long as the sentence is not imposed, the defendant is in no way restricted by the action of the court."). Moreover, as the Texas Court of Criminal Appeals has persuasively explained, in any case "in which one convicted of a misdemeanor and assessed a fine faces the possibility that he may later be subject to imprisonment if he refuses to pay the assessed fine[,] [t]his sort of likelihood is no more than the mere threat of imprisonment addressed by the [C]ourt in *Scott*." *Fortner* v. *State*, 764 S.W.2d 934, 935 (Tex. App. 1989); *see also, e.g., People* v. *Reichenbach*, 587 N.W.2d 1, 6 (Mich. 1998) (rejecting defendant's contention that "a conditional sentence, under which he might have been imprisoned had he not paid the fine, constitutes 'actual imprisonment' under *Argersinger*" because "the prospect of imprisonment was never more than a threat").

To be sure, as the Supreme Court of Alabama noted, the Court in *Scott* went on to state in passing that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74 (emphasis added). However, that comment came in the context of a case in which the statute authorized both a fine and a sentence of imprisonment, but in which only a fine had been imposed by the lower court. The Court's language, occurring as it did in a case in which no sentence of incarceration was imposed, cannot fairly be read to suggest that the mere imposition of a suspended sentence poses the sort of deprivation of liberty recognized in *Scott* and *Argersinger* as triggering constitutional protection.

Accordingly, the Court's reference to "sentenc[ing]" to a "term of imprisonment" is best understood as a shorthand way of distinguishing a mere fine from an actual deprivation of liberty.[4] That reference could not have been intended to

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[4] The United States Sentencing Guidelines provide analogous support for a distinction between the suspension of a "sentence of imprisonment" and the deprivation of liberty as a consequence of actual incarceration. *See* U.S.S.G. § 4A1.2(b) (2000). Significantly, the Guidelines, promulgated after *Scott*, expressly exclude a suspended sentence from the definition of "sentence of imprisonment": "If part of a sentence of

expand the right to State-appointed counsel beyond that established in *Argersinger*.

3. The lower court's reading of *Argersinger* and *Scott* is also foreclosed by this Court's subsequent characterizations of that opinion. For example, in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), a case not addressed by the court below, the Court expressly relied upon those two decisions in observing that the Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not *result* in the defendant's loss of personal liberty." *Id.* at 26 (emphasis added). And Justice Blackmun, in dissent, correctly characterized *Scott* as holding that "the right to counsel is not constitutionally mandated when imprisonment is not actually imposed." *Id.* at 36 n.1 (Blackmun, J., dissenting).

Likewise, in *Nichols* v. *United States*, 511 U.S. 738 (1994), the Court characterized *Scott* as holding that "so long as no imprisonment [i]s actually imposed, the Sixth Amendment right to counsel d[oes] not obtain," and that "the line should be drawn between criminal proceedings that *resulted in* imprisonment, and those that did not." *Id.* at 746 (emphasis added). In his separate concurrence, Justice Souter agreed that *Scott* "drew a bright line between imprisonment and lesser criminal penalties." *Id.* at 750 (Souter, J., concurring in judgment). Although the Supreme Court of Alabama discussed *Nichols*, it did not acknowledge this critical language from either the majority or the concurring opinion. See Pet. App. 33 n.4.

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imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." *Id.* § 4A1.2(b)(2). Moreover, the commentary to that provision states that "[t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence." *Id.* § 4A1.2 Commentary Application Note 2.

The same characterization of *Scott* was repeated in *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), which involved the appellate rights of indigents. Citing *Scott*, the Court noted that "the right to counsel at state expense, as delineated in our decisions, is less encompassing" than other rights facilitating access to a State's courts. *Id.* at 112-13. As the Court put it, "A State must provide trial counsel for an indigent defendant charged with a felony, . . . but that right does not extend to nonfelony trials if no term of imprisonment is *actually imposed*." *Id.* (emphasis added) (citation omitted).

Similarly, in *Martinez* v. *Court of Appeal of California*, 528 U.S. 152, 154 (2000), the Court cited *Scott* for the proposition that "[t]he Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted *and punished by imprisonment*." *Id.* (emphasis added). And just last Term, in *Glover* v. *United States*, 531 U.S. 198 (2001), a unanimous Court cited *Argersinger* and *Scott* for the proposition that "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

In contrast to *Lassiter*, *Nichols*, *M.L.B.*, *Martinez*, and *Glover*, the lower court's interpretation of *Scott* would trigger a right to State-appointed counsel even when the proceeding did not "result in" or "actually impose" imprisonment, and the defendant therefore is not actually "punished by imprisonment." That interpretation of *Scott* thus cannot be squared with these decisions.

II. THE SIXTH AMENDMENT'S TEXT AND HISTORY, AS WELL AS EARLY INTERPRETATIONS OF THAT PROVISION BY THE FIRST CONGRESS AND THIS COURT, MILITATE AGAINST ANY FURTHER EXTENSION OF THE RIGHT TO STATE-APPOINTED COUNSEL.

The text and history of the Sixth Amendment also militate strongly against any extension of the right to State-appointed counsel. As this Court recognized in *Scott*, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 370 (1979). Indeed, there appears to be no serious dispute among legal scholars and historians that the Amendment, as enacted, provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel and in no way mandated that counsel be provided by the government, be it federal or State. See, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] . . . whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

Amici recognize, of course, that the Court departed from this understanding of the Sixth Amendment some 70 years ago. In *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Court held that in some circumstances, which the Court said would be determined on a case-by-case basis, "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. Six

years later, the Court interpreted the Sixth Amendment to require the appointment of counsel in all federal cases where a defendant's "life or liberty is at stake." *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938). However, for the next 25 years, the Court refused to incorporate this interpretation of the Sixth Amendment against the States. Instead, it adhered to its holding in *Betts* v. *Brady*, 316 U.S. 455, 461-62 (1942), that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts," and that due process required appointed counsel in State cases only where necessary to avoid "a denial of fundamental fairness, shocking to the universal sense of justice." But in 1963, the Court, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), overruled *Betts* and held that the Sixth and Fourteenth Amendments provide indigent defendants a right to State-provided counsel in felony proceedings. *Id.* at 344-45.

Amici have no quarrel with that settled precedent. Nevertheless, in deciding whether to extend the right recognized there beyond the limits imposed in *Scott* and *Argersinger*, the Court should be mindful of the pertinent textual and historical evidence. That evidence includes (a) the English common law as it existed just prior to the adoption of the Sixth Amendment; (b) the Framers' decision not to follow State laws that expressly provided a right to appointed counsel in certain circumstances; (c) the interpretation of the Amendment's right-to-counsel provision by the first Congress; and (d) this Court's earliest interpretations of that same provision. These materials show beyond any serious doubt that the Sixth Amendment was not viewed as granting any right to government-provided representation.

A. The Amendment's Right-To-Counsel Provision Represented An Affirmative Rejection Of The English Common Law, Which Severely Limited A Defendant's Ability To Retain Counsel.

The Sixth Amendment's right-to-counsel provision was a response to the traditional English common-law rule, which severely limited the assistance of counsel in serious criminal cases. Under that rule, "a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Powell*, 287 U.S. at 60; see William M. Beaney, *The Right to Counsel in American Courts* 8-10 (Greenwood 1972) (1955). By contrast, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell*, 287 U.S. at 60. Thus, as this Court has recognized, the English rule "perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Scott*, 440 U.S. at 372; *Powell*, 287 U.S. at 60 (noting that the English rule was "outrageous" in that it gave "the right to the aid of counsel in petty offenses" but not "in the case of crimes of the gravest character, where such aid is most needed").

Contemporaneous commentators also challenged the English rule. Blackstone inquired: "Upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" 4 William Blackstone, *Commentaries on the Laws of England* 355 (12th ed. 1795), *quoted in* Beaney, *supra*, at 11. And Zephaniah Swift referred to the English rule as a "cruel and illiberal principle." 2 *A System of Laws of the State of Connecticut* 398-99 (1795-96).

Because of the absurdity of the English rule, many Colonies abandoned it before the Sixth Amendment even was drafted. See *Betts*, 316 U.S. at 465 (noting that that Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania had abandoned the English Rule

before the Sixth Amendment was adopted). As this Court has explained, in "light of th[e] common law practice, it is evident that the[se] constitutional provisions . . . were intended to do away with" that rule. *Id.* at 466. Or, as one commentator recently put it, the intent of the Framers "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U. L. Rev. 417, 425-26 (2000).

B. The Amendment's Framers Deliberately Did Not Include An Express Right To Government-Provided Counsel Even Though Some States Provided Such A Right In Limited Cases.

While making a decisive break with the English rule, the Sixth Amendment did not adopt the more expansive right to appointed counsel already recognized by some States. In fact, a comparison of the language of the Sixth Amendment with the language of contemporaneous State statutes mandating appointed counsel reveals that the Sixth Amendment's drafters deliberately avoided creating any right to appointed counsel.

When the Sixth Amendment was drafted, apparently only Connecticut and New Jersey appointed counsel for defendants facing felony indictments generally.[5] See *Betts*, 316 U.S. at 467 n.20. New Jersey's first constitution and an early statute guaranteed "assigned counsel" to indigent criminal defendants accused of "indictable offenses," which were limited to capital crimes and felonies. *See* Robert Martin &

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[5] In Connecticut, according to one commentator, "the custom of appointing counsel if the accused requested this assistance apparently existed after 1750." Beaney, *supra*, at 16. We are, however, unaware of any evidence suggesting that this custom extended beyond felonies.

Walter Kowalski, *A Matter of Simple Justice: Enactment of New Jersey's Municipal Public Defender Act*, 51 Rutgers L. Rev. 637, 644 & n.37 (1999); Acts of the General Assembly of N.J. 1012 (1791-96), *quoted in* Beaney, *supra*, at 20 (requiring courts, upon an indictment, to "assign to [defendant], if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire").

Another five States provided counsel for defendants only in capital cases. See *Betts*, 316 U.S. at 467 n.20 (Delaware, Pennsylvania, Massachusetts, and New Hampshire); Beaney, *supra*, at 17 (South Carolina). Like New Jersey, these States did so through explicit statutory language providing for "assigned" counsel.[6] Moreover, these appointed counsel provisions supplemented more general statutory language

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[6] *See, e.g.*, 3 Statutes at Large of Pa. 199 (Busch 1896), *quoted in* Beaney, *supra*, at 16 ("[U]pon all trials of said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners."); Act of Aug. 20, 1731, 43 Laws of the Province of S.C. 518-19 (Trott 1736), *quoted in* Beaney, *supra*, at 17 (stating that if a capital defendant "shall desire coun[sel], the court . . . is hereby authorized and required, immediately, upon his or their request, to assign . . . such and so many council not exceeding two, as the person or persons shall desire") (omissions in Beaney); 1791 N.H. Laws 247 (Melcher 1792), *quoted in* Beaney, *supra*, at 21 (stating that a capital defendant "shall at his request have counsel learned in the law assigned him by the court"); 2 Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807, ch. 71 app. at 1049 (providing for assigned counsel for defendants accused and indicted for treason: "And in caſe any perſon or perſons, ſo accuſed and indicted, ſhall deſire council, the Court before whom ſuch perſon or perſons, ſhall be tried, or ſome Judge of that Court, ſhall, and is hereby authorized and required, immediately upon his or their requeſt, to aſſign to ſuch perſon or perſons, ſuch and ſo many council, not exceeding two, as the perſons ſhall deſire, to whom ſuch counsil ſhall have free acceſs at all ſeaſonable hours.") Act of 1719, ch. 22, § 4, 1 Del. Laws 64, 66 (S. Adams & J. Adams, 1797) (requiring counsel in capital cases: "And that upon all trials of the ſaid capital crimes, lawful challenges ſhall be allowed, and learned council aſſigned to the priſoners.").

providing the right to retain one's own counsel. See Beaney, *supra*, at 16-21.

The language of the Sixth Amendment, by contrast, made no mention of "assigned" or appointed counsel. This silence is particularly telling given that the 55 delegates to the Constitutional Convention were generally aware of the developments in State law at the time. See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 542-43 (1989) (noting that the delegates "had wide experience" with the contemporary state constitutional debates). Moreover, the federal Constitution was modeled in many ways after State constitutions. *Id.* at 541-42. Accordingly, the Sixth Amendment's silence on the right to appointed counsel reveals that—unlike the State laws that explicitly required appointed counsel—the Amendment was not designed to impose such a requirement.

In all events, as these examples show, the "right to counsel" provided in the Sixth Amendment could not possibly have swept more broadly than the right to State-appointed counsel expressly provided in the most expansive State statutes. Thus, it could not have provided any right to appointed counsel in misdemeanor cases, even if it were read to create such a right with respect to some or all felonies.

C. The First Congress Interpreted The Amendment As Not Providing Government-Appointed Counsel.

Actions of the first Congress support the conclusion that the Sixth Amendment did not require appointed counsel. For example, the Judiciary Act of 1789, which was signed the day before the Sixth Amendment was proposed in Congress, contained the following provision: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally *or* by the assistance of such counsel or

attorneys at law as by the rules of the said courts . . . shall be permitted to manage and conduct causes therein." Ch. 20, § 35, 1 Stat. 73, 92 (1789) (emphasis added). Unlike the State statutes providing for appointed counsel in some circumstances, the Judiciary Act made no mention of that subject. As Beaney noted, "If Congress had thought that the proposed Sixth Amendment counsel provision embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." Beaney, *supra*, at 28.

Even more telling is a 1790 statute requiring that anyone indicted for treason or other capital crimes be offered "assigned counsel":

> [Such a defendant] shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried . . . shall, and they *are hereby authorized and required immediately upon his request to assign to such person such counsel*, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours . . . .

Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (emphasis added).

The enactment of this statute contemporaneously with the Sixth Amendment quite clearly indicates that Congress did not believe the Sixth Amendment itself required "assigned" counsel in such cases. See Beaney, *supra*, at 28 (questioning why Congress would have passed this statute if it understood that the Sixth Amendment already provided this protection). For if the Sixth Amendment itself provided such a right, the right provided in the statute would have been both redundant and woefully under-inclusive. As this Court has repeatedly held, "[a]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty

evidence of its true meaning.'" *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (omission in original) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 803-04 (1992) ("[I]nterpretations of the Constitution by the First Congress are persuasive."); *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 & n.3 (1986) (listing 20 members of the first Congress who had been delegates to the Philadelphia Convention).

D. This Court's Earliest Decision Construing The Amendment's Counsel Provision Concluded That It Did Not Create A Right To Government-Provided Counsel.

This Court echoed this same view some 100 years later when it had what appears to have been its first opportunity to address expressly the scope of the Sixth Amendment's right-to-counsel clause. In *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891), the Court addressed a claim by several federal court clerks for reimbursement for the cost of providing copies of indictments to criminal defendants. This required the Court to determine whether such copies were required by the Sixth Amendment.

The Court held they were not. Under the Sixth Amendment, the Court held, "[t]here is . . . no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners." *Id.* The Court reasoned that "[t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to [criminal defendants]; but it was not contemplated that this should be done at the expense of the government." *Id.*

Given that this was (apparently) the first decision expressly interpreting this provision of the Bill of Rights, *Van Duzee* is entitled to significant weight. Like the other historical evidence discussed above, that decision casts substantial

doubt on the propriety of further expanding the federal right to appointed counsel.

III. A Holding That Misdemeanor Defendants Who Receive Only Suspended Sentences Are Entitled To State-Appointed Counsel Would Lead To Anomalous Treatment Of Indigent And Non-Indigent Defendants And Would Impose Significant Costs On States And Their Citizens.

Besides being unsupported by this Court's decisions or the text and history of the Sixth Amendment, the rule adopted by the Supreme Court of Alabama—mandating a Sixth Amendment right to State-funded counsel whenever a misdemeanor offender receives a suspended or probated sentence (see Pet. App. 35)—would create anomalous results and impose undue, significant burdens on States.

The States currently employ a broad array of approaches to government-appointed counsel. Some States have expanded the right to counsel for indigents charged with misdemeanors beyond what this Court has held to be the federal minimum, and thus provide a right to appointed counsel in a broader class of cases than that required by this Court's decisions. Specifically, some States and the District of Columbia appoint counsel for indigents charged with misdemeanors if a jail sentence is *authorized* or otherwise could result from a conviction.[7] Some States require the appointment of counsel for indigents when imprisonment, a substantial fine, or other "consequences of magnitude" could result.[8] Other States

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[7] District of Columbia, Hawaii, Louisiana, Massachusetts, Minnesota, Nebraska, New York, Oklahoma, Tennesse, Virginia, Washington, West Virginia, and Wisconsin. For the Court's convenience, a catalogue of the States' law on appointed counsel is annexed as an Appendix to this brief.

[8] Alaska, Kentucky, Maryland, New Jersey, and North Carolina. *See* Appendix.

appoint counsel for indigents charged with misdemeanors regardless of the penalty.[9]

But many States have not gone beyond the minimum federal requirements imposed by this Court's decisions. Several States, consistent with *Scott* and *Argersinger*, guarantee State-appointed counsel only if a defendant is actually imprisoned.[10] Several other states provide a right to appointed counsel in misdemeanor cases, but only if the authorized jail sentence exceeds a certain minimum, or only where certain other requirements are met.[11] Thus, in these states as well, the *Scott* and *Argersinger* rule provides a right to appointed counsel in some cases where State law does not. Expanding the federal appointed-counsel requirement would require these States, at a minimum, to change their procedures in some or all of their misdemeanor cases.

Although States are free to confer rights in excess of the constitutional minimum, the Court has been properly mindful that it "do[es] not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." *Argersinger* v. *Hamlin*, 407 U.S. 25, 38 (1972). States may therefore choose to require and to fund a greater right to counsel than that required by the United States Constitution "based on their own constitutions or public policy." *Nichols* v. *United States*, 511 U.S. 738, 748 n.12 (1994). But the Court should not impose significant

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[9] California, Delaware, Indiana, Iowa, Oklahoma, and Oregon. *See* Appendix. Other States have unique approaches that appear to impose stricter requirements than those imposed in *Argersinger* and *Scott*: Connecticut, Illinois, Kansas, and Missouri. *See* Appendix.

[10] Alabama, Arkansas, Colorado, Florida, Georgia, Maine, Mississippi, Montana, North Dakota, Rhode Island, South Carolina, and Texas; *cf.* Vermont and Wyoming. *See* Appendix.

[11] Idaho, Michigan, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. *See* Appendix. Several States apparently have not clearly decided the issue: Arizona, Nevada, and Utah. *See* Appendix.

burdens on all the States where, as here, there is no constitutionally significant liberty interest at stake, and where additional requirements would actually undermine federal and State policies.

A. The Rule Adopted Below Perversly Guarantees Indigent Defendants A Right To State-Appointed Counsel In Circumstances Where Similarly Situated Non-Indigents Would Not Hire Counsel For Themselves.

First, expanding the federal right to State-appointed counsel further from its core of providing counsel in capital cases, see *Powell* v. *Alabama*, 287 U.S. 45 (1932), and other felony cases, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), creates a real danger of undermining the equality rationale that undergirds those decisions. The Court's early decisions emphasized placing indigent defendants charged with serious crimes on an "equal" footing with non-indigent defendants such that the indigent would be entitled to counsel in cases where non-indigents would naturally hire their own counsel. See *Gideon*, 372 U.S. at 344-45; cf. *Powell*, 287 U.S. at 72-73. Yet the interpretation of the Sixth Amendment by the court below would mandate State-funded counsel for indigent defendants in circumstances where non-indigent defendants would be unlikely to hire their own counsel.

Indeed, a study by the United States Department of Justice confirms that many misdemeanor defendants already choose not to hire attorneys. That study found that, while only three of every 1000 felony defendants opt for self-representation, nearly 40 percent of misdemeanor defendants choose to forgo counsel, even when court-appointed counsel is available. Bureau of Justice Statistics, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1 (Nov. 2000). Moreover, the report indicates a sharp drop in the percentage of defendants who hire a private attorney when accused of a misdemeanor rather than a felony. One third of accused felons hire private attorneys, while less than one fifth of misdemeanor

defendants hire counsel. *Id.* at 3 tbl.2. In sum, non-indigent individuals are far more likely to represent themselves in misdemeanor cases than to hire counsel.

Thus, if the Court were to adopt the rule of constitutional law adopted by the Supreme Court of Alabama, one effect of that ruling would be "to favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a minor petty-offense case would be a luxury the family could not afford." *Argersinger*, 407 U.S. at 50 (Powell, J., concurring in result). This mandate would lead to the anomalous result that indigent defendants would be in a superior position, rather than an equal position, vis-à-vis most non-indigent defendants.

B. The Rule Adopted Below Imposes Significant Burdens On State Courts And Prosecutors And Undermines State Probation Systems And Recidivism Policies.

A rule granting misdemeanor defendants an expanded right to State-funded counsel also would greatly expand the burdens on State courts and prosecutors, and undermine State probation systems and recidivism policies.

1. As Justice Powell noted in *Argersinger*, "[t]here are thousands of [State] statutes and ordinances which authorize imprisonment for six months or less, usually as an alternative to a fine." 407 U.S. at 52 (Powell, J., concurring in result). Likewise, there are thousands of State statutes and ordinances amenable to suspended sentences. The offenses covered by these statutes include the "broad spectrum of petty-offense cases [that] daily flood[] the lower criminal courts" including "some of the most trivial of misdemeanors, ranging from spitting on the sidewalk to certain traffic offenses." *Id.*

One of the virtues of the *Scott-Argersinger* doctrine is that it permits judges to screen the most serious cases from the beginning, with the full realization that, if the case is proven, an indigent defendant may only be incarcerated if he has had

the opportunity for State-funded counsel. The rule adopted by the Supreme Court of Alabama would remove this discretion and significantly widen the circle of mandatory representation. In such a case, "nearly every misdemeanor sentence would be within the scope of 'actual imprisonment,'" thereby requiring a Sixth Amendment right to counsel. *People* v. *Reichenbach*, 587 N.W.2d 1, 7 (Mich. 1998). This possibility would greatly expand the right to counsel and place extensive additional burdens on States.

This rule, in turn, would have several implications for scarce State resources. First, "in many sections of the country, there simply will not be enough lawyers available to meet this demand either in the short or long term." *Argersinger*, 407 U.S. at 56 (Powell, J., concurring in result). This problem is likely to be particularly acute in rural areas.

Second, judicial resources will be overburdened with the inevitable "over lawyering" of relatively minor cases. See *id.* at 59 (Powell, J., concurring in result). "The absence of direct economic impact on the client, plus the omnipresent ineffective-assistance-of-counsel claim, frequently produces a decision to litigate every issue." *Id.* at 58. Moreover, "[i]t is likely that young lawyers, fresh out of school" will pursue every angle of relatively simple matters, thereby "stretching out . . . the process with consequent increased costs to the public." *Id.* at 58-59.

Third, an expanded appointed-counsel requirement would require States to hire additional lawyers. Many lesser crimes are currently not prosecuted by lawyers, but by, for example, an uncounseled police officer presenting the State's case. An expanded right to appointed counsel will create additional pressures for States to provide prosecutors in minor case. See *id.* at 49 (Powell, J., concurring in result) ("[G]overnment often does not hire lawyers to prosecute petty offenses; instead the arresting officer presents the case.").

An expanded right to appointed counsel will also inevitably require more State-funded defense lawyers. The costs of providing counsel to indigent defendants are already substantial. In 1999, for example, the one hundred largest counties spent $1.2 billion on indigent defense. U.S. Dep't of Justice, *Indigent Defense Services in Large Counties, 1999* 1 (Nov. 2000). Requiring states to provide defense counsel for misdemeanor defendants who receive only suspended or probated sentences of incarceration would send this figure still higher, placing significant mandatory burdens on States in cases where there is no constitutionally significant deprivation of a defendant's liberty.

2. The rule adopted by the court below could also interfere with State probation systems. As petitioner points out, courts in Alabama can impose probation only if they first sentence a defendant to a term of incarceration, and then suspend the sentence. Pet. Br. 15 n.5 (citing Ala. Code § 15-22-50). Under the Supreme Court of Alabama's view, judges in States with similar systems would have to provide counsel to indigent defendants, not only when they expect to impose a jail sentence, but also when they expect to sentence the defendant to probation if he or she is found guilty.

3. Finally, a rule invalidating suspended or conditional sentences could also gravely undermine the anti-recidivism policies of many States. Just as the United States Sentencing Guidelines permit the consideration of uncounseled misdemeanor convictions to enhance punishment in subsequent offences, see *Nichols*, 511 U.S. at 749, it is an important public policy of many States to punish recidivism by enhancing punishment in future cases based on criminal history. See, *e.g.*, *Parke* v. *Raley*, 506 U.S. 20, 26 (1992) (observing that recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States). Such policies deter crime even as they protect the public from the most dangerous criminals.

The Court's ruling in this case will likely have a significant impact on whether States can continue to utilize suspended sentences to enhance an offender's sentence for a subsequent offense. That is because sentences obtained in violation of the Sixth Amendment likely cannot be relied upon for sentence-enhancement purposes. See *Nichols*, 511 U.S. at 749 (holding that uncounseled misdemeanor conviction was valid under *Scott* because no prison term was imposed and, accordingly, could be used to enhance subsequent offenses). A rule invalidating a conditional or suspended sentence imposed on an uncounseled misdemeanor offender would undermine these State policies. In so doing, it would create an increased risk of harm from repeat offenders.

* * * *

This Court should reject the Supreme Court of Alabama's attempt to expand the right to appointed counsel beyond that recognized in *Argersinger* and *Scott*. That expansion has no basis in the text or history of the Sixth Amendment, in sound public policy, or in this Court's decisions. The line that this Court drew in those decisions is both clear and sound. It should be respected and enforced in this case.

CONCLUSION

For these reasons, the decision of the Supreme Court of Alabama should be reversed.

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APPENDIX

APPENDIX OF STATE AUTHORITIES

Alabama: Ala. R. Crim. P. 6.1(a) (providing that an indigent is entitled to appointment of attorney "in all criminal proceedings in which representation by counsel is constitutionally required").

Alaska: *Gregory* v. *State*, 550 P.2d 374, 378 (Alaska 1976) (providing indigent defendants with counsel "'when the penalty upon conviction of the misdemeanor may result in incarceration in a jail or penal institution, or the loss of a valuable license, or a fine so heavy as to indicate criminality'").

Arkansas: Ark. R. Crim. P. 8.2(b) (requiring appointment of counsel for indigents "unless [defendant] is charged with a misdemeanor and the court has determined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty").

Arizona: Ariz. R. Crim. P. 6.1(a) (providing that a defendant is "entitled to be represented by counsel . . . except . . . where there is no prospect of imprisonment or confinement"); but see *Neilson* v. *Superior Court*, 767 P.2d 1185, 1186 (Ariz. Ct. App. 1988) (holding that Rule 6.1(b) "is founded on" *Gideon* and *Argersinger*); *Campa* v. *Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) ("there is no authority that Arizona has standards which are more strict in this area than the U.S. Constitution").

California: Cal. Penal Code § 686; *Tracy* v. *Municipal Court*, 587 P.2d 227, 230 (Cal. 1978) (interpreting § 686 to guarantee appointed counsel to all indigent misdemeanor defendants).

Colorado: Colo. Rev. Stat. §§ 21-1-103, 16-5-501 (requiring the public defender to represent indigents, unless the prosecutor states in writing that he will not seek jail time upon conviction).

Connecticut: Conn. Gen. Stat. § 51-296 (providing counsel for indigent defendants wherever a sentence "will involve immediate incarceration or a suspended sentence of incarceration with a period of probation").

Delaware: Del. Code Ann. tit. 29, § 4602 (1997) ("The Public Defender shall represent, without charge, each indigent person who is under arrest or charged with a crime . . . .").

District of Columbia: D.C. Code Ann. §§ 11-2601, 11-2602 (providing appointed counsel for indigent defendant who "faces a loss of liberty").

Florida: Fla. R. Crim. P. 3.111(b)(1) (providing that appointment of counsel for an indigent charged with a misdemeanor is not required if the judge states in writing, before trial, that the defendant will not be imprisoned if convicted).

Georgia: *Brawner* v. *State*, 296 S.E.2d 551, 552 (Ga. 1982) ("A defendant in a misdemeanor *criminal* prosecution is entitled to counsel only where the defendant is sentenced to actual imprisonment.").

Hawaii: Haw. Rev. Stat. § 802-1 (providing indigent defendants with appointed counsel when "punishable by confinement in jail").

Idaho: Idaho Code § 19-852(a)(1) (requiring appointment of counsel for "needy person" charged with a "serious crime"); *id.* § 19-851(d)(2) (defining "serious crime" to include "any misdemeanor or offense the penalty for which, excluding imprisonment for non-payment of a fine, includes the possibility of confinement for more than six (6) months"); *State* v. *Hardman*, 818 P.2d 782, 785 (Idaho Ct. App. 1991).

Illinois: 725 Ill. Comp. Stat. 5/113-3(b) (providing appointed counsel to indigent defendants "[i]n all cases, except where the penalty is a fine only").

Indiana: Ind. Const. art. I, § 13; *Brunson* v. *State*, 394 N.E.2d 229, 231 (Ind. Ct. App. 1979) (interpreting § 13 to requiring appointed counsel "for all persons charged with a criminal misdemeanor, regardless of whether the charge ultimately results in the misdemeanant's imprisonment").

Iowa: Iowa R. Crim. P. 26 (providing indigents with the right to appointed counsel).

Louisiana: La. Const. art. I, § 13 (providing appointed counsel if defendant is "indigent and charged with an offense punishable by imprisonment").

Kansas: Kan. Stat. Ann. § 12-4405 (requiring appointed counsel where judge "has reason to believe that if found guilty, the accused person might be deprived of his or her liberty and is not financially able to employ counsel").

Kentucky: Ky. Rev. Stat. Ann. §§ 31.110(1), 31.100(4)(b) (providing appointed counsel to needy persons charged with "[a] misdemeanor or offense any penalty for which includes the possibility of confinement or a fine of five hundred dollars ($500) or more").

Maine: *State* v. *Cook*, 706 A.2d 603, 605 (Me. 1998) (holding, "consistent with the reasoning in *Scott*, that an indigent misdemeanor defendant has a right to counsel under . . . the Maine Constitution when imprisonment will actually be imposed").

Maryland: Md. Ann. Code art. 27A, §§ 2(h)(2), 4(b) (providing appointed counsel for indigent defendants "where constitutionally required" and where charged with a "[s]erious crime," including misdemeanors punishable by "the possibility of confinement for more than three months or a fine of more than $500").

Massachusetts: Mass. Sup. Jud. Ct. R. 3:10; Mass. R. Crim. P. 8 (stating that the court shall appoint counsel if the defendant is "charged with a crime for which a sentence of imprisonment . . . may be imposed").

Michigan: Mich. R. of Ct. 6.610(D)(2) (providing for appointed counsel for indigent defendant charged with an offense punishable by "more than 93 days in jail").

Minnesota: Minn. R. Crim. P. 5.02(2) (providing appointed counsel to indigent charged with "misdemeanor punishable by incarceration").

Mississippi: Miss. Code Ann. § 25-32-9(1) ("No . . . indigent . . . shall be imprisoned as a result of a misdemeanor conviction unless he was represented by the public defender or waived the right to counsel."); see also *id.* § 99-15-15 (providing for the appointment of counsel).

Missouri: Mo. Rev. Stat. § 600.042.4.(2) (requiring appointment of counsel for indigents, *inter alia*, charged with a misdemeanor "which will probably result in confinement in the county jail upon conviction").

Montana: Mont. Code Ann. § 46-8-101(3)(b) ("The defendant, if unable to employ counsel, is entitled to have counsel assigned if . . . the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option . . . .").

Nebraska: Neb. Rev. Stat. Ann. § 29-3902 (providing appointed counsel for indigent defendants "in misdemeanor cases punishable by imprisonment").

Nevada: Nev. Rev. Stat. Ann. § 171.188(3)(b) (providing for appointment of counsel where "required"); *id.* § 178.397 (providing appointed counsel for every indigent defendant "accused of a gross misdemeanor or felony").

New Hampshire: N.H. Rev. Stat. Ann. §§ 604-A:2, 625:9 (providing appointed counsel where defendant charged with a felony or Class A misdemeanor in which maximum punishment one year); *State* v. *Scarborough*, 470 A.2d 909, 913 (N.H. 1983) (noting New Hampshire's right to appointed counsel "covers a broader range of criminal defendants than . . . the Sixth and Fourteenth Amendments").

New Jersey: *Rodriguez* v. *Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971) (holding that counsel should be appointed for indigents when conviction "entail[s] imprisonment in fact or other consequence of magnitude").

New Mexico: N.M. Stat. Ann § 31-16-3(A) (providing appointed counsel to indigent defendants accused of "a serious crime," including misdemeanor carrying "a possible penalty of confinement for more than six months").

New York: N.Y. Crim. Proc. Law § 170.10(3)(c) (providing for assigned counsel to indigent defendants, except for traffic infractions).

North Carolina: N.C. Gen. Stat. § 7A-451(a)(1) (providing that, among other things, an indigent is entitled to counsel if conviction carries a penalty or imprisonment with a fine of $500 or more).

North Dakota: N.D. R. Crim. P. 44 ("[E]very indigent defendant is entitled to have counsel appointed at public expense . . . unless the magistrate has determined that sentence upon conviction will not include imprisonment.").

Ohio: Ohio R. Crim. P. 2, 44(A) (requiring appointed counsel to defendant charged with "a serious offenses," including misdemeanors punishable by more than six months confinement); see *id.* 44(B) (prohibiting imposition of "sentence of confinement" on defendant charged with petty offense who is unable to obtain counsel).

Oklahoma: Okla. Stat. tit. 22, § 1355.6.A (providing appointed counsel to all indigent defendants who are charged with an offense "punishable by incarceration").

Oregon: Or. Rev. Stat. § 135.050(4) (providing for court-appointed counsel for all "indigents charged with a crime").

Pennsylvania: Pa. R. Crim. P. 316 (providing for assigned counsel in all "summary cases" for "all defendants who are without financial resources or who are unable to employ counsel when there is a likelihood that imprisonment will be imposed" and in all "court cases"); see 18 Pa. Cons. Stat. § 106(c)(2) (defining summary offenses to include offenses providing for a maximum of 90 days imprisonment).

Rhode Island: *In re Advisory Opinion to the Governor*, 666 A.2d 813, 818 (R.I. 1995) (advising the Governor that the Court's interpretation of the Sixth Amendment in *Argersinger*, *Scott*, and *Nichols* "as a guarantee of a criminal defendant's right to counsel only when imprisonment is actually imposed represents the appropriate standard that should be applied under . . . the Rhode Island Constitution").

South Carolina: S.C. Code Ann. § 17-3-10 (providing counsel to any defendant "financially unable to retain counsel" and "entitled to counsel under the Constitution of the United States"); S.C. App. Ct. R. 602 (informing accused of right to counsel "if a prison sentence is likely to be imposed following any conviction").

South Dakota: S.D. Codified Laws §§ 22-6-2, 23A-40-6.1 (no appointed counsel is required for indigent defendant who is not in custody and for whom court has stated on the record that no incarceration shall be imposed following any conviction, when charged with crime with a maximum penalty of thirty days imprisonment and/or $200 fine).

Tennessee: *Allen* v. *McWilliams*, 715 S.W.2d 28, 32 (Tenn. 1986) (amending Supreme Court Rule 13 to provide appointed counsel in all cases where misdemeanor defendant "is in jeopardy of incarceration").

Texas: Tex. Crim. Proc. Code Ann. § 26.04 (providing for the appointment of counsel whenever an indigent is charged with a misdemeanor punishable by imprisonment); *Fortner* v. *State*, 764 S.W.2d 934, 935 (Tex. App. 1989) (interpreting article 26.04 "to require the appointment of counsel only when the court knows that the punishment it will assess includes imprisonment or when the trial is before the jury and the possible punishment includes imprisonment").

Utah: Utah R. Crim. P. 8(a) (providing appointed counsel where indigent defendant "faces a substantial probability of deprivation of liberty"); *Webster* v. *Jones*, 587 P.2d 528, 530 (Utah 1978) ("[W]here a person is charged with an offense which may be punished by imprisonment, he is entitled to the assistance of [court-appointed] counsel"); cf. *Layton City* v. *Longcrier*, 943 P.2d 655, 658 (Utah Ct. App. 1997) (stating that no counsel was required where the sentence was suspended because "*Scott* establishes an after-the-fact test that requires a reviewing court to find an uncounselled misdemeanor conviction constitutional when the defendant was not sentenced to jail").

Vermont: Vt. Stat. Ann. tit. 13, §§ 5201, 5231 (providing assigned counsel to needy defendants charged with a "serious crime," including "[a] misdemeanor the maximum penalty for which is a fine of more than $1,000.00 or any period of imprisonment unless the judge, at the arraignment but before the entry of a plea, determines and states on the record that he will not sentence the defendant to a fine of more than $1,000.00 or a period of imprisonment if the defendant is convicted of the misdemeanor").

Virginia: Va. Code Ann. §§ 19.2-159, 19.2-160 (providing appointed counsel to indigents charged with crime that may be punishable by imprisonment).

Washington: Wash. Super. Ct. Crim. R. 3.1(a), (d) (providing for assignment of appointed counsel to indigents in "all criminal proceedings for offenses punishable by loss of liberty").

West Virginia: W. Va. Code § 50-4-3 (providing for appointment of counsel to indigents in any criminal proceeding where the applicable statutes "authorize a sentence of confinement").

Wisconsin: Wis. Stat. § 967.06 (providing indigent defendants with appointed counsel in "any offense which is punishable by incarceration").

Wyoming: Wyo. Stat. Ann. §§ 7-6-102, 7-6-104 (providing indigent defendants with appointed counsel in all "serious crime[s]," including a "misdemeanor . . . for which incarceration as a punishment is a practical possibility, provided, however, that counsel need not be appointed for a misdemeanor if the judge, at the initial appearance, determines and states on the record that he will not sentence the defendant to any period of imprisonment if the defendant is convicted of the misdemeanor").

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OCT 26 2001
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No. 00-1214

In The
Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari
To The Supreme Court of Alabama

MOTION FOR LEAVE TO FILE UNTIMELY BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the State of Alabama may subject a defendant to a jury trial of a serious misdemeanor carrying a potential jail sentence of up to one year while denying him counsel and then, upon conviction, impose a suspended thirty-day jail sentence, a fine of $500, and two years' probation.

MOTION FOR LEAVE TO FILE LATE BRIEF

Pursuant to Rule 21, Rules of the Supreme Court, the National Association of Criminal Defense Lawyers (NACDL) moves this Court for leave to file this brief *amicus curiae* in support of the respondent in the above-entitled matter. The brief was due on August 20, 2001. The brief was not filed on time because of a miscommunication between the undersigned and the primary author of the brief, Professor Steven Duke (for which the undersigned accepts full responsibility) regarding who was going to forward the brief to Cockle Printing.

Mr. Mills, counsel for respondent, has consented to the late filing of the brief. The undersigned contacted Ms. Morman, counsel for petitioner, to obtain her consent, but has not heard back from her.

Good cause for filing this brief *amicus curiae* out of time exists because Professor Duke and Mr. Liotti have written an excellent brief, and the interests of justice would not be served if the undersigned's oversight prevented the Court from having the benefit of their trenchant analysis. Professor Duke wrote the seminal law review article in this area, The Right to Appointed Counsel: Argersinger and Beyond, 12 Am. Crim. L. Rev. 601 (1975), which was cited twice by the dissent in Scott v. Illinois, 440 U.S. 367, 380, 383 (1979). He was appointed by the Court to represent the respondent in the landmark case of United States v. Cronic, 462 U.S. 1128 (1984), and he represented the respondent in United States v. Jackson, 390 U.S. 570 (1968), as well. Mr. Liotti has also written extensively on the right to counsel. See, e.g., Does Gideon Still Make a Difference?, 2 N.Y.C.L. Rev. 105 (1998).

As an organization, NACDL files *amicus* briefs of consistently high quality, which have been cited in numerous opinions of this Court. See, e.g., I.N.S. v. St. Cyr, ___ U.S. ___, 121 S. Ct. 2271, 2291 n.50 (2001); Texas v. Cobb, 532 U.S. 162, ___, 121 S. Ct. 1335, 1342 (2001); Lopez v. Davis, 531 U.S. 230, 244 n.6 (2001); United States v. Rodriguez-Moreno, 526 U.S. 275, 281 (1999); United States v. Balsys, 524 U.S. 666, 674 n.3 (1998); Bryan v. United States, 524 U.S. 184, 196 (1998); Almendarez-Torres v. United States, 523 U.S. 224, 269 (1998); Montana v. Egelhoff, 518 U.S. 37, 47 (1996); Ratzlaf v. United States, 510 U.S. 135, 146 (1994); Godinez v. Moran, 509 U.S. 389, 388 (1993); Georgia v. McCollum, 505 U.S. 42, 69 (1992) (dis. opn.); Riggins v. Nevada, 504 U.S. 127, 144 (1992) (conc. opn.). The Court has granted the relief sought here on prior occasions. See, e.g., City of Simi Valley v. Young, 531 U.S. 1104 (2001); American Foreign Service Ass'n v. Garfinkel, 489 U.S. 1050 (1989); Mansell v. Mansell, 488 U.S. 906 (1988); Booth v. Maryland, 487 U.S. 1081 (1987); United States v. Salerno, 479 U.S. 1015 (1986); Johnson v. Transportation Agency, Santa Clara County 479 U.S. 912 (1986); Arkansas v. Oklahoma, 465 U.S. 1018 (1984); Newport v. Fact Concerts, Inc., 450 U.S. 992 (1981); Flint Ridge Development Co. v. Scenic Rivers Assoc., 425 U.S. 902 (1976); Bonelli Cattle Co. v. Arizona, 414 U.S. 904 (1973); Goldstein v. California, 414 U.S. 883 (1973); Committee for Public Education & Religious Liberty v. Nyquist, 411 U.S. 946 (1973); Hunt v. McNair, 410 U.S. 952 (1973); United States v. Enmons, 409 U.S. 1034 (1972); Almeida-Sanchez v. United States, 409 U.S. 1035 (1972); Heller v. New York, 409 U.S. 1021 (1972); Goldstein v. California, 409 U.S. 976 (1972); Paris Adult Theatre I v. Slaton, 409 U.S. 945 (1972); United States v. 12 200-Ft. Reels of Super 8mm Film, 409 U.S. 909 (1972); Roaden v. Kentucky, 409 U.S. 910 (1972); Alexander v. Virginia, 409 U.S. 911 (1972); Victory Carriers, Inc. v. Law, 404 U.S. 908 (1971);

Accordingly, NACDL requests the Court grant leave to file this brief *amicus curiae* out of time.

Respectfully submitted,

DAVID M. PORTER
Co-Chair, NACDL *Amicus* Committee

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent Lereed Shelton's assertion of rights under the Fourteenth Amendment. Both petitioner and respondent have granted amicus consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate

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1. No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. See Rule 37.6. The petitioner and respondent have consented to the filing of this brief, and amicus has filed the letters of consent with the Clerk of the Court, pursuant to Rule 37.3(a).

organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned about the denial of counsel to an indigent charged with a serious crime and required to defend himself in a jury trial without the guiding hand of counsel.

STATUTES INVOLVED

ALABAMA CODE

§13A-5-2. Authorized dispositions

(c) Every person convicted of a misdemeanor or violation shall be sentenced by the court to:

(1) Imprisonment for a term authorized by Section 13A-5-7; or

(2) Pay a fine authorized by Section 13A-5-12; or

(3) Both such imprisonment and fine

(d) Every person convicted of a felony, misdemeanor or violation may be placed on probation as authorized by law.

(e) This article does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt or impose any other lawful civil penalty. Such a judgment, order or decree may be included as part of the sentence.

§13A-5-7. Sentence of imprisonment for misdemeanors and violations.

(a) Sentences for misdemeanors shall be a definite term of imprisonment in the county jail or to hard labor for the county, within the following

limitations:

(1) For a Class A misdemeanor, not more than one year.

§ 13A-5-12. Fines for misdemeanors and violations.

(a) A sentence to pay a fine for a misdemeanor shall be for a definite amount, fixed by the court, within the following limitations:

(1) For a Class A misdemeanor, not more than $2,000.00.

§15-22-52. Conditions of probation.

The court shall determine and may at any time modify the conditions of probation and may include among them the following or any other condition. Such conditions may provide that the probationer shall:

(1) Avoid injurious or vicious habits;

(2) Avoid persons or places of disreputable or harmful character;

(3) Report to the probation office as directed;

(4) Permit the probation officer to visit him at his home or elsewhere;

(5) Work faithfully at suitable employments as far as possible;

(6) Remain within a specified place;

(7) Pay the fine imposed or costs or such portions thereof as the court may determine and in such installments as the court may direct;

(8) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court; and

(9) Support his dependents to the best of his ability.

§15-22-24(d)

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(2) If the court revokes probation, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence...

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(4) The court shall not revoke probation and order the confinement of the probationer unless the court finds on the basis of the original offense and the probationer's intervening conduct, either of the following:

a. No measure short of confinement will adequately protect the community from further criminal activity by the probationer.

b. No measure short of confinement will avoid depreciating the seriousness of the violation.

STATEMENT OF THE CASE

Respondent LeReed Shelton was accused of third-degree assault, a class A misdemeanor carrying a possibility of a jail sentence of up to one year (Alabama Code §13A-5-7) and a fine of up to $2,000.00 (Alabama Code §§13A-5-2, 13A-5-7, 13A-5-12). He was not offered counsel if indigent. He elected a jury trial and represented himself before the jury, unsuccessfully. He was sentenced to 30 days in jail, a $500 fine, and restitution. The jail sentence was suspended and he was placed on two years' probation. The Alabama Supreme Court affirmed his conviction but vacated the suspended jail sentence because respondent had not had or waived counsel and the court believed that the suspended jail sentence was invalid because it could not be carried out consistent with respondent's Fourteenth and Sixth

Amendment right to counsel. This Court granted the State's petition for a writ of certiorari to consider the constitutional validity of the Alabama court's decision.

SUMMARY OF ARGUMENT

A jail sentence of any duration cannot be carried out or executed if the defendant was denied counsel for his defense. To do so would clearly "imprison" him contrary to Scott v. Illinois, 440 U.S. 367 (1979) and involve a "loss of liberty" contrary to Argersinger v. Hamlin, 407 U.S. 25 (1971). Accordingly, it was entirely lawful for the court below to vacate the thirty-day suspended sentence imposed on respondent who was required to defend himself in a jury trial without counsel. Whether it was "unconstitutional" to "impose" such a sham sentence on the accused by suspending it and placing him on probation may be of interest to theoreticians but is not crucial to the correct resolution of this case. Clearly, Alabama was not required by the Constitution to engage in the charade of threatening the defendant with a jail sentence it could not under any circumstances actually inflict.

Should this Court conclude that it is constitutionally permissible to impose a suspended jail sentence on an uncounseled defendant and then later revoke probation and send the defendant to jail, it will have ripped the soul out of Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1971) and invited the States to circumvent the right to counsel by sending defendants to prison in stages without ever subjecting the issue of guilt to serious adversary testing. At the very least, the Court should cap that invitation by revisiting Argersinger and Scott and

ruling consistent with Argersinger, Duncan v. Louisiana, 391 U.S. 145 (1968), and Baldwin v. New York, 399 U.S. 66 (1970), that anyone who has a Sixth Amendment right to a jury trial cannot be denied a lawyer to make that right meaningful. A "criminal prosecution" means no less when applied to the right to a jury trial than when applied to the right to assistance of counsel. Therefore, respondent's conviction, as well as his sentence, was unconstitutional.

ARGUMENT

The decision of the court below is correct. Alternatively, if a suspended jail sentence (in addition to a substantial fine) can sometimes be imposed on an indigent defendant who is denied counsel, the underlying conviction is invalid where, as here, the defendant faced charges sufficiently serious to guarantee him a Sixth Amendment right to a jury trial. Accordingly, if the Court rejects the rationale of the Alabama Supreme Court, it should invalidate respondent's underlying conviction or remand to permit the court below to do so.

Nearly forty years ago, this Court, in Gideon v. Wainwright, 372 U.S. 335 (1963), found the Sixth Amendment right to counsel "fundamental and essential to a fair trial." Id. at 343. Justice Black, speaking for a unanimous Court, said that lawyers are "necessities, not luxuries." Id. at 344. He said the "noble ideal" of fair trials "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him," and declared that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id.

Although there was nothing in Gideon that limited its rationale to felony charges, many state courts read Gideon as not requiring counsel in misdemeanor cases. Nonetheless, most states in the decade after Gideon did extend the right to counsel to some misdemeanants.[2] Some even went all the way, extending the right to every indigent accused of any offense, petty or serious.[3]

This Court returned to the problem in Argersinger v. Hamlin, 407 U.S. 25 (1971). Argersinger had pled guilty in a Florida court to carrying a concealed weapon, an offense punishable by up to six months in jail and a $1,000 fine, without being informed of his right to counsel. He was sentenced to a $500 fine or 90 days in jail. Id. at 26. Alleging that he had been indigent and unable to afford counsel, he sought a writ of habeas corpus. The Florida Supreme Court extended the right of appointed counsel to offenses punishable by more than six months' imprisonment but, since Argersinger's offense was just under the line, dismissed Argersinger's writ.

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2. See Comment, "Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States," 3 Creighton L. Rev. 103 (1970).

3. Blake v. Municipal Court, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966). "Apparently, in nine states virtually all misdemeanants have the right to appointed counsel...." Comment, supra note 2, at 124. That still seems to be the case. "[M]any, if not a majority of, States guarantee the right of counsel whenever imprisonment is authorized by statute rather than actually imposed." Nichols v. United States, 511 U.S. 738, 748 (n. 12) (1994). See also, Brief of Texas, et al., Amici Curiae, 22.

Justice Douglas noted for this Court that the Sixth Amendment contains standards for "all criminal prosecutions." Among the rights guaranteed by that amendment are the right to a speedy and public trial, the right to know the charge, the right of confrontation, and the right to compulsory process.[4] Yet the only right guaranteed by the Sixth Amendment which had been limited by type of offense is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145 (1968), restricted such right to offenses punishable by more than six months in jail (regardless of the actual punishment imposed). See also, Baldwin v. New York, 399 U.S. 66, 69 (1970) ("no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"). Justice Douglas distinguished Duncan's limitation with the observation that the right to jury trial "has a different genealogy and is brigaded with a system of trial to a judge alone." Argersinger, 407 U.S. at 29. "While there is historical support for limiting...trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel...." Id. at 30 (citation omitted). The Court

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4. The Sixth Amendment provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

therefore rejected "the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." Id. at 30-31.

Putting aside the right to counsel where "loss of liberty is not involved,"[5] the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."[6]

Commentators read Argersinger as creating a two-tiered analysis of the right to counsel in misdemeanor cases.[7] The first tier or screen was whether the offense was sufficiently serious to be a "criminal prosecution" for purposes of the right to a jury trial. That ordinarily meant that any authorized jail term of more than six months was, per Duncan and Baldwin, a sufficient gauge of seriousness to trigger the jury trial right regardless of the sentence actually imposed. If the offense was "serious" under the Duncan/ Baldwin test, Argersinger

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5. Id. at 37.

6. Id.

7. See, e.g., S. Krantz, C. Smith, D. Rossman, P. Froyd & J. Hoffman, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin 69-117 (1976); S. Duke, "The Right to Appointed Counsel: Argersinger and Beyond," 12 Am. Crim. L. Rev. 601 (1975). Justices Brennan, Marshall and Stevens advocated this approach in Scott, 440 U.S. at 375 (dissenting opinion), as did Justice Blackman, 440 U.S. at 389 (dissenting opinion).

left undisturbed the understanding that the charge was not only a "criminal prosecution" for the right to trial by jury but also for all other Sixth Amendment rights, including the right to counsel. Argersinger expressly dealt only with cases in which "loss of liberty was involved." In such cases, the Court said, there is no need to examine the "seriousness" question, no need to find the right to trial by jury in order to find the right to counsel, for the latter is even more fundamental than the former, and any deprivation of liberty is sufficiently serious to require the crucial help of counsel. Actual loss of liberty, then, was a second screen or second stage of analysis necessary only if no "criminal prosecution" was otherwise found by applying Duncan's criteria.

This Court took a sharply different approach in Scott v. Illinois, 440 U.S. 367 (1979), opining that Argersinger "did indeed delimit the constitutional right to appointed counsel in state criminal proceedings...[and] [w]e therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id. at 373-74 (emph. added). There was, of course, nothing in the Argersinger opinion or in Scott's analysis of it to warrant the injection of "only." Indeed, if Scott's dictum were taken literally, a person could be lawfully convicted of murder without counsel so long as he wasn't imprisoned. As Justice Brennan cogently observed in his Scott dissent, the majority not only misread Argersinger, it ignored the well-established precedents recognizing a constitutional right to a jury trial for people who are not imprisoned but nonetheless face charges upon which imprisonment in excess of sixth

months is authorized. Thus, if Scott were correct, a defendant like respondent Shelton in this case would have a Sixth Amendment right to a jury trial, per Baldwin and Duncan, but would have to enjoy that constitutional right without the assistance of counsel if the State elected to forgo imprisonment upon conviction. How can a prosecution be a "criminal prosecution" for purposes of the Sixth Amendment's right to a jury trial but not be a "criminal prosecution" for purposes of the Sixth Amendment's right to counsel? The Court in Scott did not say.

Although the court below did not question the holding in Scott and respondent will presumably not do so either, we respectfully urge the Court not to reaffirm the "imprisonment only" approach of Scott without at least reconsidering its illogic and its misinterpretation of Argersinger. We especially urge the Court not to extend Scott to allow the imposition of a suspended prison sentence while denying the accused the benefit of counsel. That would be tantamount to a fundamental rejection of Gideon itself.

I.

THE SUSPENDED JAIL SENTENCE WAS PROPERLY VACATED.

A. A suspended jail sentence may not be carried out or executed if the defendant was denied counsel.

Argersinger and Scott agree that even a day in jail, imposed as punishment for a crime, cannot be constitutionally carried out unless the defendant was afforded counsel at his trial or guilty plea. Accordingly,

LeReed Shelton cannot be jailed if probation is revoked because he would be jailed not for violating probation but for the underlying offense upon which he was originally sentenced. Cf., Johnson v. United States, 529 U.S. 624, 700 (2000) ("[w]e ... attribute postrevocation penalties to the original conviction). Not only is this the universal understanding of what happens when probation is revoked and a suspended sentence reimposed, it is clearly implicit in the Alabama statutory scheme. Alabama Code §15-22-54 (d)(2), provides that upon revocation of probation, the court may impose the sentence that was suspended or any lesser sentence. Section (d) (4) provides that when the court revokes probation and imposes confinement, that decision is grounded "on the basis of the original offense and the probationer's intervening conduct." (Emphasis added). Thus, unlike the situation in Nichols v. United States, 511 U.S. 738 (1994), where an uncounseled misdemeanor conviction resulted in a felony status for a second offense, the punishment imposed when probation is revoked is for the original offense, not the subsequent conduct involved in the probation violation. As the Chief Justice emphasized in his Nichols opinion, repeat-offender laws penalize "only the last offense committed by the defendant." 511 U.S. at 747. Although Nichols itself was highly debatable (it overruled a recent decision to the contrary in Baldasar v. United States, 446 U.S. 222 (1986)), the difference between Nichols and the instant case is fundamental.

Under a recidivist statute such as that in Nichols, the defendant can be imprisoned if and only if his second crime is proved beyond reasonable doubt, with all Sixth Amendment protections, including assistance of counsel. In contrast, if respondent could be imprisoned after a

probation revocation, that could be accomplished in entirely informal, unstructured proceedings where proof standards are amorphous and far less exacting and rigorous than those applicable in a criminal prosecution.[8]

If a suspended sentence could be carried out although the accused was denied counsel, respondent could have received a suspended sentence of up to one year in jail and a $2,000 fine for his Class A misdemeanor of third-degree assault. See Alabama Code §§13A-5-2, 13A-5-7, 13A-5-12. The conditions of probation could hardly be broader or vaguer. They include avoiding "injurious or vicious habits," "persons or places of disreputable or harmful character," and "any other condition." Alabama Code §15-22-52. The requirements of Argersinger and Scott could easily be circumvented if the state could deny counsel, convict the defendant of a misdemeanor, sentence him to a suspended term of imprisonment up to one year, suspend the sentence, place him on probation, then revoke probation for injurious or vicious habits, associating with undesirables, failure to report, or some other vague infraction. He would go to jail without ever having an opportunity to defend against the underlying criminal charges with the assistance of counsel.

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8. Indeed, one who receives a suspended sentence subject to probation in Alabama can be imprisoned with virtually no process at all, pending the revocation proceedings. Alabama Code §15-22-54 (d) authorizes a probation officer to arrest a probationer without a warrant and his statement that there has been a violation is sufficient authorization to detain the probationer in county jail.

We do not understand the petitioner to contend that such a procedure could be lawful, i.e., that a suspended sentence can be carried out if the defendant was denied counsel at his trial. Petitioner is unclear about its position on that issue.

The State seems to argue that a suspended jail sentence is permissible because there has been no "actual imprisonment" and until that happens, there is no violation of Scott, even though Scott said that no "indigent criminal defendant [can] be sentenced to a term of imprisonment" absent assistance of counsel. 440 U.S. at 374. Petitioner's Brief, at 9. Thus, petitioner seems to believe that the jailhouse doors must actually be closed and locked on the defendant's body before he retroactively acquires a right to counsel. Were that so, even an unconditional, unprobated jail sentence could not be invalidated on right to counsel grounds so long as it was stayed pending appeal. That is manifestly not so. No coherent argument is made by petitioner that the State may imprison someone in Shelton's shoes without violating the Constitution. Thus, it is hard to understand just what fault petitioner finds with the decision of the court below.

Most, if not all, of the lower court decisions cited by petitioner that suggest that a suspended sentence is not actual imprisonment (Petitioner's Brief, 16-19), involve questions of the validity of the conviction, not the validity of the sentence. Here, as there, the validity of the conviction was not questioned by the court below. The petitioner does not point to any decision that it says actually allows a defendant to be imprisoned on a previously suspended sentence when he was denied counsel.

Petitioner argues that if a suspended sentence triggers the right to counsel, this would divert "money and time to resolve misdemeanor offenses and reexamine the use of uncounseled convictions for enhancement purposes.... Finally, successful challenges would emasculate anti-recivism statutes...." Petitioner's Brief, at 21. This would be so, however, only if imposing a suspended sentence invalidates the underlying conviction, and the Alabama Supreme Court clearly held that it does not (J.A. 40). The Brief of Texas, et al., Amici Curiae, appears equally confused on this point. See id. at 25, 28. Indeed, although Amici repeatedly characterize the decision of the court below as "expanding" the right to counsel, it is not clear how Amici think that has been accomplished. Like petitioner, Amici do not clearly assert that a suspended sentence can actually be carried out. Rather, they seem concerned that such a sentence would invalidate the underlying conviction even if no effort is made to carry out the sentence. That issue is not before the Court.

Amici Curiae in support of petitioner imply that unless a state can impose a suspended jail sentence, it has no way to impose probation and the decision below therefore significantly restricts the States in their ability to utilize probation. Amici Br. at 27. The States, however, are not required to link probation to a suspended jail sentence. Connecticut, for example, has a process called "Accelerated Pretrial Rehabilitation" under which a defendant, with the permission of the court, is placed on probation before adjudication. If the probation is successful, the charge is dismissed and all records are expunged. If probation is violated, the defendant does not automatically go to jail, the charges are simply reinstated and the process begins where it left

off before probation. Conn. Gen. Statutes §54-56e. Assuming that such probation is not a "loss of liberty" within the meaning of Argersinger, there is no reason why it could not be imposed without affording counsel.

B. A sentence that cannot be carried out without violating the Constitution is itself unconstitutional, or in any event, plainly within the power of the State of Alabama to vacate or decline to impose.

Petitioner and Amici Curiae in its support characterize the holding of the Alabama Supreme Court as "extending" the right to appointed counsel in misdemeanor cases where a suspended sentence is imposed rather than "actual imprisonment." While such would be a defensible position for the court to have taken, it did not do so. Rather, the Alabama Supreme Court clearly -- and merely -- held that a conditional or probationary jail sentence can never actually be carried out if the defendant was denied counsel and is therefore a nullity. Had the Alabama Supreme Court held that Shelton had a constitutional right to counsel that was violated by his prosecution, rather than by his sentence, it would have vacated the conviction as well as the sentence.

Since the Alabama Court was clearly right in viewing the suspended jail sentence as one that cannot be executed without running afoul of Argersinger and Scott, it was also right in vacating that portion of the sentence. Whether entering a judgment that purports to enter an invalid sentence, i.e., a sham sentence, is itself a violation of the Constitution was not reached by the Alabama

Court. Arguably, the judgment appears to have been a straightforward application of Alabama law to vacate a sham sentence -- one that couldn't be carried out without violating the Constitution. As such, it should clearly be affirmed.

II

IF A SUSPENDED JAIL TERM MAY CONSTITUTIONALLY BE IMPOSED WITHOUT PROVIDING COUNSEL, AND ULTIMATELY CARRIED OUT, THEN THIS COURT SHOULD RECONSIDER SCOTT'S IMPRISONMENT-ONLY PRINCIPLE, REVERT TO THE "SERIOUS OFFENSE" TEST OF BALDWIN AND DUNCAN, AND INVALIDATE RESPONDENT'S CONVICTION OR ALLOW THE COURT BELOW TO DO SO.

Good arguments can be made for extending the Sixth Amendment right to counsel to all crimes for which imprisonment is authorized, regardless of the sentence actually imposed. See T. Liotti, Does Gideon Still Make a Difference?, 2 N.Y.C. L. Rev. 105, 122 (1998). Misdemeanor charges are no less complex or legally arcane than felony charges and the rules of trial procedure -- understood by only a few lawyers -- are the same, whether trial is of a misdemeanor or a felony. There is some stigma attached to conviction of any offense for which jail has been authorized. Moreover, convictions for seemingly insignificant offenses can become highly prejudicial to the defendant who becomes again embroiled in the criminal process, for they may elevate his second misdemeanor to felony status, as in Nichols, or be used adversely as part of his criminal history in sentencing. The misdemeanor conviction can

also result in loss or denial of an occupational or professional license, ineligibility for various benefits or employments, and even deportation.[9] Whether the right to counsel should be so extended is not before the Court. If, however, the Court is inclined to add a serious hazard -- possible imprisonment if probation is revoked -- to the lengthy list of land mines already buried in uncounseled misdemeanorland, then the "imprisonment only" test of Scott must be abandoned.

If a valid suspended jail sentence may be imposed without counsel, it can presumably be one the duration of which is limited only by the statute authorizing sentences. In respondent's case, the vulnerability would be to a jail sentence of up to one year (plus a $2,000 fine). It is simply unthinkable that a state could be permitted to imprison someone for up to one year while denying him counsel, merely by doing it in stages that circumvent the provision of counsel.

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9. The charge for which respondent was convicted could theoretically cause the deportation of an alien. A sentence of one year makes a crime of violence an "aggravated felony", which subjects the violator to immediate removal. See 8 U.S.C. §ll0l(a)(43)(F), §l227(a)(2)(A)(iii). This is true whether the state calls the offense a misdemeanor or a felony and even though the entire sentence remains suspended. "Any reference to a term of imprisonment or a sentence with respect to any offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. §1101(a)(48)(B).

Thus, at the very least, the Court, if inclined to validate uncounseled suspended sentences, should apply Baldwin and Duncan and recognize a right to counsel whenever there is a right to a jury trial, e.g., when a jail sentence of more than six months is authorized.[10] That would at least limit the circumvention of the right to counsel to cases in which the suspended sentence was for six months or less.

CONCLUSION

For the foregoing reasons, the decision of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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10. As this Court has often recognized, there may be other charges so serious that they be deemed not petty and thus trigger a right to a jury trial even where a jail sentence of more than six months is not authorized. See Blanton v. City of North Las Vegas, 489 U.S. 538 (1989); see also Lewis v. United States, 518 U.S. 322 (1996). In any such case, there should certainly also be a right to counsel.

Supreme Court, U.S.
FILED
DEC 7 2001

No. 00-1214

In The

Supreme Court of the United States

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Alabama

BRIEF AMICUS CURIAE
BY INVITATION OF THE COURT

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QUESTION PRESENTED

Where counsel has not been afforded to an indigent defendant, does the Constitution of the United States bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, and may such a defendant be incarcerated in the event the suspension or probation is revoked?

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INTEREST OF AMICUS CURIAE

Charles Fried and Hale and Dorr LLP submit this brief pursuant to the October 18, 2001 order of this Court:

> Charles Fried, Esquire, of Cambridge, Massachusetts, is invited to file a brief, and to argue, as *amicus curiae*, in opposition to the judgment below and in support of the following position: where counsel is not afforded to an indigent defendant, the Constitution of the United States does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked.

STATEMENT OF THE CASE

After a jury trial, in which he "did a creditable job of defending his own case," Joint App. at 33, Respondent LeReed Shelton was convicted of third degree assault, a misdemeanor carrying a maximum permissible punishment of one year imprisonment and a $2,000 fine. *Id.* at 26; *see also* ALA. Code § 13A-5 (1975). Shelton had been advised of his right to employ counsel and advised of the difficulties involved in proceeding without counsel. Joint App. at 33. He was not, however, advised that an attorney would be appointed for him if he could not afford one.[1] *Id.* The judge sentenced him to serve thirty days in

[1] At no point has Shelton made the claim that proceeding without counsel before a jury, rather than before a judge, is so inherently perilous to him that it deprived him of due process. *See Betts v. Brady*, 316 U.S. 455 (1942) (due process required

the county detention center. Resp. Brief in Opp. to Cert. at 1-2. The judge then suspended the term of imprisonment, imposing two years of unsupervised probation conditioned on the payment of court costs, a fine, reparations and restitution within thirty days. *Ibid.*[2]

The Supreme Court of Alabama affirmed the conviction but reversed the imposition of the suspended sentence:

> Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel, and having found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right, we affirm Shelton's conviction but reverse that aspect of his sentence imposing 30 days of suspended jail time.

Joint App. at 40.[3]

---

appointment of counsel where special circumstances of particular case indicated that indigent defendant needed lawyer to obtain fair trial), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (adopting *Betts'* case-by-case analysis for deciding whether appointment of counsel required in probation revocation hearing).

[2] Although a further condition of good conduct does not explicitly appear in the sentence of the Circuit Court, *see* Joint App. 26-27, such a condition is not unusual and was perhaps implicit in the court's sentence since probationary terms may include the avoiding of certain habits, places, persons, etc., *see* ALA CODE. § 15-22-52 (1975), and may be modified by the court at any time with or without a hearing, *see* ALA. RULES CRIM. PROC. (2001), Rule 27.2.

[3] The court based its decision on *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and its progeny. Accordingly, the decision may be

The State of Alabama petitioned this Court for a writ of *certiorari* on the following question:

> In light of the "actual imprisonment" standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and refined in *Scott v. Illinois*, 440 U.S. 367 (1979), does the imposition of a suspended or conditional sentence in a misdemeanor case invoke a defendant's Sixth Amendment right to counsel?

This Court granted the writ on May 14, 2001.

In its brief on the merits, Alabama argues that a suspended sentence is a "mere threat" of imprisonment and does not implicate the right to counsel. Petitioner's *amici*, the State of Texas, *et al.*, argue to the same effect. Shelton argues both that the Sixth Amendment precludes the imposition of any conditional sentence on an uncounseled defendant[4] and, in the alternative, that *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), should be overruled and the Sixth Amendment extended to require the appointment of counsel in any case where a term of imprisonment is an authorized penalty. In its reply brief, Alabama makes clear that "the State and its *amici* accept that, under *Argersinger* and

---

taken to rest on federal constitutional grounds, and not on any interpretation of state law, although some Alabama cases are also cited.

[4] The terms "uncounseled defendant" and "uncounseled conviction" are shorthand for an indigent person who was not offered counsel at government expense, or the conviction of such a person. There can be no question that the Sixth Amendment requires that in any criminal proceeding a person who wishes to be represented by retained counsel must be allowed that assistance.

Scott, a defendant cannot be actually incarcerated unless he was properly informed of his right to appointed counsel. Accordingly, there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation." Reply Brief at 9.

SUMMARY OF THE ARGUMENT

The question whether a conditional sentence of incarceration may be imposed on an indigent misdemeanor defendant, who has not been offered counsel, is properly before the Court. It follows that the further question, whether the defendant may be incarcerated for breach of the conditions in the original sentence, may and should also be answered. Both questions should be answered affirmatively. It makes no sense to conclude, as Alabama argues, that a conditional sentence may be imposed but may not be carried out.

The statements in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), on which Shelton and the court below relied, should properly be understood to stand for no more than the proposition that an offer of counsel is required as a predicate for a sentence of incarceration to be imposed immediately upon a misdemeanor conviction. The Court's later cases, particularly *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), confirm that the right to counsel must be evaluated separately for each proceeding, that a right to counsel in one proceeding does not necessarily entitle a defendant to counsel in

other proceedings, and that practical considerations must play a role in any further extensions of *Argersinger*.

In this case, Shelton had no right to appointed counsel at the time the conditional sentence was imposed because he was not actually imprisoned at the conclusion of that proceeding. Because the sentence was valid when imposed, the state may, without violating Shelton's constitutional rights, revoke the probation and impose the suspended sentence, if Shelton subsequently violates the conditions of the suspension.

Practical considerations confirm the conclusion that states should be allowed to revoke uncounseled conditional sentences. Experience and empirical data strongly suggest: that conditional sentences are an important tool for law enforcement and the maintenance of public order; that the utility of that tool depends on the ability of courts to carry out the threat implicit in the original conditional sentence; and that a constitutional requirement of counsel as a predicate for imposing such conditional sentences may impose unmanageable burdens and rigidities on some jurisdictions.

The constitutionally required contours of the subsequent proceeding, in which an offender may be remanded to custody for breach of the conditions in a conditional sentence, present separate issues that need not be addressed at this time.

ARGUMENT

I. Whether A State May Revoke A Conditional Sentence Is An Issue Properly Before The Court.

There are four potential solutions to the problems raised by conditional sentences of imprisonment imposed on uncounseled misdemeanor defendants: (1) The state must offer counsel whenever a term of imprisonment is an authorized penalty for the offense with which the defendant is charged.[5] (2) A conditional sentence of incarceration may never be imposed on an uncounseled misdemeanor defendant. (3) A conditional sentence of incarceration may be imposed on an uncounseled misdemeanor defendant, but the state may not subsequently enforce the sentence of incarceration if the defendant violates the conditions of the sentence. (4) A conditional sentence of incarceration may be imposed on an uncounseled misdemeanor defendant, *and*, in an appropriate revocation proceeding, the state may order his incarceration, if he violates the terms of the conditional sentence.[6] We assume that it is the fourth alternative that the Court

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[5] Alabama correctly points out that Shelton raises this possibility for the first time in his brief on the merits in this Court. *See* Resp. Brief at 27-31. The suggestion in the brief of *Amicus* National Association of Criminal Defense Lawyers that counsel must be provided "when a jail sentence of more than six months is *authorized*," Brief at 19 (emphasis in original), is a version of this alternative and would impose the same rigidities that the Court sought to avoid in *Argersinger* and later cases.

[6] In Section IV, we discuss issues concerning the procedural guarantees a state would have to provide in such a proceeding, particularly whether the defendant would have to be afforded counsel.

has asked us to brief and argue, as neither Alabama nor its *amici* defend that alternative.

Whether a state can revoke a conditional sentence, if appropriate procedures are followed, is an issue properly before the Court. If Alabama may not later impose the suspended term of incarceration for violation of the terms of the suspension unless Shelton was offered counsel at the original proceeding, the outcome would be functionally identical to a rule that conditional sentences may never be imposed on an uncounseled defendant in the first place (alternative two). Shelton essentially concedes this point:

> Probation, must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective.

Resp. Brief at 17. In short, the answer to the question whether a state may impose a conditional sentence like Shelton's in the absence of counsel entails the answer to the further question whether the sentence may, after some appropriate subsequent proceeding, be carried out.[7]

---

[7] Because Petitioner urges the third alternative and the Respondent the second, and because the Court's acceptance of the Petitioner's contention requires a reversal of the decision below and reinstatement of the conditional sentence of incarceration, while acceptance of the Respondent's position entails affirmance of the court below, the positions of the parties are sufficiently adverse to create a case or controversy, conferring jurisdiction on this Court. U.S. Const. Art. III, § 2. 28 U.S.C. § 1257(a).

II. The Court's Jurisprudence Confirms That A State Does Not Deprive An Uncounseled Misdemeanor Defendant Of Due Process If It Revokes A Conditional Sentence And Imposes The Term Of Incarceration.

A. The Argument That A Conditional Sentence May Not Be Imposed (Or, Alternatively, That It May Not Be Revoked) Relies On An Overly Broad Reading Of *Argersinger* And *Scott*.

Amici Texas, *et al.*, correctly and in detail set out the background and history of the Sixth Amendment's provision regarding the assistance of counsel. We agree with their conclusion that the Sixth Amendment addressed the distinct issue of a criminal defendant's right to retain and be assisted by counsel. The constitutional right to counsel only began to embrace a right to appointed counsel for indigent defendants in the 1930's, and then through the partial agency of the more flexible and amorphous concept of due process: under certain circumstances a conviction in which the defendant had no ability to procure, and thus was not assisted by, counsel did not comport with due process of law. *Betts v. Brady*, 316 U.S. 455 (1942); *Powell v. Alabama*, 287 U.S. 45, 71 (1932). In *Johnson v. Zerbst*, 304 U.S. 458 (1938), that ruling was announced as an invariable requirement of the Sixth Amendment in all federal criminal prosecutions.[8]

[8] The defendants in *Johnson* were convicted of felonies. The opinion does not expressly limit the holding to felonies. *See* 304 U.S. at 463 ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives

Gideon v. Wainwright, 372 U.S. 335 (1963), incorporated *Johnson v. Zerbst* into the Fourteenth Amendment, applying that rule to the states.

Shelton's strongest argument for the position that Alabama may not impose a conditional sentence in cases such as this is based not on the Sixth Amendment itself but on the language in two leading cases, *Argersinger* and *Scott*:

> "[N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger*, 407 U.S. at 37.
>
> "The denial of the assistance of counsel will preclude the imposition of a jail sentence." *Id.* at 38.
>
> "The run of misdemeanors will not be affected by today's ruling. But in those that *end up* in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy." *Id.* at 40 (emphasis supplied).
>
> "Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that *actual imprisonment* is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of

the assistance of counsel.") Several lower courts subsequently held, however, that there was no right to appointed counsel in "petty" misdemeanor cases punishable by less than six months imprisonment. *Argersinger* overruled these cases and applies to both state and federal misdemeanor proceedings.

actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373 (emphasis supplied).

From these statements Shelton reasons that, if an uncounseled misdemeanor conviction may never "end up" in actual imprisonment – even by the route of the later imposition of a suspended sentence – then it follows that a state may not impose such a conditional sentence in the first place. Resp. Brief at 17. Alabama bases its position that it may not revoke Shelton's conditional sentence on the same language. Reply Brief at 9.

Shelton and Alabama read too much into this language. In neither case did the Court have before it the issue presented here. In *Argersinger*, the defendant had been sentenced to a term of incarceration directly upon his conviction, *Argersinger*, 407 U.S. at 26, and the case addressed only that circumstance. And in *Scott*, the defendant received only a $50 fine although a sentence of imprisonment of up to one year was authorized for the offense (shoplifting) with which he had been charged. *Scott*, 440 U.S. at 368. The Court addressed and rejected Scott's contention that he was entitled to appointed counsel because a sentence of imprisonment was authorized, even if it was not imposed. *See id.* at 373 n.4. Accordingly, the language from those two cases, even if it could bear the construction Shelton puts on it, was not only dictum but perhaps inadvertent dictum at that.

B. The Court's Later Decisions Confirm That The Right To Counsel Must Be Determined Separately For Each Proceeding, And That Practical Considerations Are Relevant In Establishing The Limits Of The *Argersinger* Principle.

The decisions in *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), confirm that the Court has no intention of pushing *Argersinger* to the limit of its logic.

In *Nichols*, the Court held that an uncounseled misdemeanor conviction, valid under *Scott*, may be relied on to enhance a prison sentence for a subsequent offense. *Nichols*, 511 U.S. at 746-47. The uncounseled misdemeanor conviction led to a 25 month increase in the prison term for the second offense. *Id.* at 741. The Court nevertheless concluded, as a "logical consequence" of *Scott*, that the uncounseled conviction could be considered in the later sentencing proceeding. *Id.* at 746. Any other result would "create [ ] a 'hybrid' conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution." *Id.* at 744 (*quoting Baldasar v. Illinois*, Powell, J., dissenting, 446 U.S. 222, 231 (1980)).[9]

In *Gagnon*, the Court ruled that counsel was not necessarily required at a probation revocation hearing, even though revocation of probation would result in the

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[9] In *Baldasar*, the court held that an uncounseled conviction that did not result in a sentence of imprisonment could not be used to increase a later sentence under a repeat offender statute. However, the 5-4 decision in *Baldasar* had no majority rationale. The *Nichols* Court agreed with the dissenters in *Baldasar*.

re-imposition of a 15 year prison sentence. 411 U.S. at 780, 790-91. The right to counsel in such a proceeding instead would depend on a balancing of factors particular to the relevant case:

> [W]e think that the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel.
>
> . . . .
>
> . . . [D]ue process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

411 U.S. at 787-89 (footnotes and citations omitted).

These cases confirm two important principles:

First, the extent of the right to appointed counsel must be determined separately for each proceeding. Thus, in *Nichols*, the defendant was not entitled to appointed counsel at the time of his original misdemeanor conviction because he was not sentenced to prison at that time. The conviction was valid when imposed, and the fact that it had been uncounseled did not undermine its validity in a later proceeding in which it was used to enhance the prison sentence on the defendant's conviction for a subsequent offense. 511 U.S. at 746-47. Similarly, in *Gagnon*, although the defendant presumably would have been entitled to counsel at the time

of his original plea (he pled guilty to a felony), he was not necessarily entitled to counsel at the subsequent probation revocation hearing. 411 U.S. at 790-91.

Second, considerations of practicability and the severity of the burden on actual defendants must play a role in any further extensions of *Argersinger*. As the Court stated in *Scott*:

> [W]e conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

Scott, 440 U.S. at 373 (footnotes omitted). Accordingly, in *Argersinger*, the Court decided that states must offer appointed counsel only to those misdemeanor defendants whose cases result in immediate actual imprisonment. *Argersinger*, 407 U.S. at 40. And in *Gagnon*, the Court held that states must offer appointed counsel at probation revocation hearings only in those cases where the need for counsel outweighs the costs and collateral disadvantages. *Gagnon*, 411 U.S. at 790.

C. Shelton Had No Right To Appointed Counsel At The Time The Conditional Sentence Was Imposed.

As demonstrated by Alabama and its *amici*, Shelton did not have a right to appointed counsel at the time of his original trial because the judge determined that he would not be actually imprisoned at the conclusion of that proceeding. The threat of incarceration implicit in the conditional sentence imposed upon him could only mature into actual confinement if Shelton later chose to violate the conditions of the suspension, as determined in a subsequent proceeding. In this respect the case is analogous to *Nichols*, in which an additional term of imprisonment was brought about by Nichols's subsequent criminal conduct. Nor is Shelton's argument sound that a conditional sentence is itself such a deprivation of liberty as to require the appointment of counsel. *Argersinger* makes clear that it is only actual incarceration that requires the appointment of counsel and not any lesser imposition.

D. Because Shelton Had No Right To Appointed Counsel At The Time The Conditional Sentence Was Imposed, Alabama May Revoke The Conditional Sentence Without Violating Shelton's Constitutional Rights.

Because Shelton's sentence was valid at the time it was imposed, Alabama may revoke the conditional sentence without violating Shelton's constitutional rights.

The "actual imprisonment" standard, established in *Argersinger*, is not retroactive. The right to counsel must

be capable of being ascertained at a particular point in time. As *Nichols* and *Gagnon* confirm, the relevant point of inquiry, in this case, was the time of Shelton's original conviction. Because Shelton's sentence was valid at the time it was imposed, it remains valid even if, through his own subsequent conduct, he "ends up" in prison because of the revocation of his probation. The Court observed in *Nichols* that enhancement statutes, such as those at issue in *Nichols*, "do not change the penalty imposed for the earlier conviction." 511 U.S. at 747. The same is true here. Even if Shelton's probation is subsequently revoked, the original sentence was, and remains, a conditional sentence.

Even Shelton concedes that "[p]robation must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective." Resp. Brief at 17. Having complied with the Constitution in obtaining a conviction against Shelton, Alabama should have the accompanying power to revoke the suspended sentence if Shelton fails to comply with its terms.

Shelton will have only himself to blame if, at some later point in time, he is incarcerated for violating these terms. Contrary to Shelton's argument, Resp. Brief at 2, he would not be in the same position as a defendant immediately imprisoned at the time of conviction. Any such defendant would surely acknowledge the significant difference between being able to return home after sentencing and being incarcerated forthwith upon conviction.

In short, the uncounseled conditional sentence is valid when imposed because it does not result in actual incarceration in that proceeding. And being valid it may serve as a proper predicate for incarceration in a later proceeding, if the defendant violates the conditions of suspension. As the Supreme Court of Illinois stated in a case in which a defendant had received an uncounseled conditional sentence on conviction of misdemeanor battery and was subsequently incarcerated for breach of the conditions in that sentence:

> We are mindful that resentencing, after probation has been revoked, is on the original conviction and not on the act which served as the basis of the violation. Thus, in the instant case, the jail sentence was imposed upon the battery convictions. Nonetheless, a conviction valid at the time it was entered, based on a sentence of probation, is not retroactively invalidated by the imposition of a jail term following the revocation of the defendant's probation. For the defendant knew, when he was sentenced to probation, that violation of its terms and conditions could end up in his confinement. In other words, when a defendant is placed on probation, it is he alone who holds the keys to the prison gates during his probationary period.

People v. Lynn, 102 Ill. 2d 267, 276-277, 464 N.E.2d 1031, 1036 (1984) (internal citations omitted).[10]

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[10] There is very little case law concerning the authority of a court to revoke conditional sentences in light of *Argersinger*. In addition to *Lynn*, in *United States v. Nash*, 703 F. Supp. 507, 510 (W.D. La. 1989), the Western District of Louisiana determined that it could revoke the defendant's probation, even though he had not received counsel at the time of the underlying conviction, because the court "must retain the authority to enforce compliance with the terms of probation" and because "the term of imprisonment [would result] not from the original charge, but rather from Nash's violation of the terms of his probation." At least three courts have relied primarily on the language in *Argersinger* and *Scott* in concluding that the revocation of probation and imposition of a suspended sentence violated the defendant's right to counsel because it resulted in actual imprisonment. *See, e.g., Shayestah v. City of South Salt Lake*, 217 F.3d 1281, 1284 (10th Cir. 2000); *United States v. Foster*, 904 F.2d 20 (9th Cir. 1990); *Ramirez v. State of Texas*, 486 S.W.2d 373 (Tex. Crim. App. 1972).

Alabama in its Reply seeks to detach the premise from its logical conclusion by arguing that while the conditional sentence is valid when imposed, the State may not subsequently lift the suspension and impose the term of imprisonment. In Alabama's view this position is saved from incoherence because, although a state may not imprison an uncounseled defendant for a violation of a conditional sentence, the sentencing court may treat such a breach as a contempt. Reply at 11.[11] We see no substantial difference between that response to the defendant's breach and the remand to prison under the original sentence. Both responses treat the original suspended sentence as the predicate for a subsequent term of incarceration, imposed in a later proceeding. The remand to prison under the original sentence is simply the more

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[11] Alabama also suggests that the breach of conditions may be met by imposing a term of *supervised* probation. *Ibid.* Of course, this only postpones the day of reckoning. What is the court to do if the defendant violates the terms of his supervised probation?

usual and straightforward response to the defendant's breach.

III. Practical Considerations Confirm The Conclusion That States Must Be Entitled To Revoke Conditional Sentences.

A. The Available Statistics Suggest That States Rely On Conditional Sentences In A Large Number Of Misdemeanor Cases, And That Only A Small Percentage Of These Cases "End Up" In Actual Incarceration.

As stated in *Scott*, in deciding whether to extend the rule of *Argersinger*, the Court will take into consideration what is "reasonably workable," and what may "impose unpredictable, but necessarily substantial, costs on 50 diverse states." 440 U.S. at 373. Any workable solution to the issues raised by this case must take into account the large number of misdemeanor cases filed each year, and the need to process these cases as efficiently as possible. A recent study by the National Center for State Courts suggests that more than 8.7 million misdemeanor cases were filed in state courts in 1999.[12] The greatest proportion of these cases are what must be considered minor

[12] See "Examining the Work of State Courts, 1999-2000" National Center for State Courts, Court Statistics Project, available at http://www.ncsc.dni.us/divisions/research/csp/csp-index.html. This report indicates that 4,924,710 cases were filed in courts in general and unified jurisdiction, and 9,279,112 caes in courts of limited jurisdiction, in 1999. 12% of the cases filed in courts of general jurisdiction were misdemeanors, while 88% of those filed in courts of limited jurisdiction were misdemeanors.

matters: petty thefts, motor vehicle offenses, minor altercations between acquaintances that somehow got out of hand, and other low level trouble-making. Trivial as these may seem viewed individually, taken together they assume great significance: the peace and good order of our communities depend on the maintenance of the norms such conduct offends. *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996).[13] The offenses must of necessity be adjudicated in volume and with a certain informality, or they will be ignored altogether at significant cumulative cost to society. Often they will be prosecuted not by lawyers but by the peace officers who intervened or apprehended the offender in the first place. Offenders who might be able to afford counsel may not think it worth the expense. Indeed, the statistics cited by *amici* Texas, *et al.*, suggest that nearly 40% of misdemeanor defendants choose to forego counsel, even when offered court-appointed counsel, and that fewer than 20% hire private attorneys. *Amici* Brief at 24-25.

[13] "[D]isorder and the fear it generates are serious problems that warrant attention in and of themselves. Disorder demoralizes communities, undermines commerce, leads to the abandonment of public spaces, and undermines public confidence in the ability of government to solve problems; fear drives citizens further from each other and paralyzes their normal, order-sustaining responses, compounding the impact of disorder. Restoring order is key to revitalizing our cities, and to preventing the downward spiral into urban decay that threatens neighborhoods teetering on the brink of decline, regardless of whether a reduction in crime results." *Id.* at 242.

The available data, although sparse, confirms that states rely on conditional sentences in a significant percentage of these misdemeanor cases. Shelton cites statistics from the Bureau of Justice Statistics indicating that, in each of years 1996 through 1999, between 1.4 million and 1.8 million adults were on probation for misdemeanors. Resp. Brief at 18-19. A newly-released report from the same source states that more than 1.7 million adults were on probation for misdemeanors in the year 2000.[14]

The data further suggests that, although conditional sentences are frequently imposed, only a small percentage of uncounseled misdemeanor defendants are ultimately incarcerated for breaching the terms of a conditional sentence. Of those who had not received counsel in their original trial, the Bureau of Justice Statistics states that, in the summer of 1997, 2,607 persons confined in state prisons had previously been on probation and were confined for something other than a new offense (*i.e.*, for violating the terms of their probation).[15]

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[14] *See* Bureau of Justice Statistics, U.S. Dept. of Justice, Press Release (Aug. 26, 2001). The Bureau of Justice Statistics reports calculate separately the total number of adults on probation, and the percentages of those probationers on probation for non-felony offenses. In 2000, more than 3.8 million adults were on probation, and 46% of those probationers were on probation for a non-felony offense.

[15] Some jurisdictions (including our own Commonwealth of Massachusetts) make counsel available in all misdemeanor cases or in all cases in which a sentence of imprisonment is authorized; others do not. *See* the Appendix to the Brief of *Amici* Texas, *et al.*, which does not allow a definitive count of how each jurisdiction approaches the issues in this case, but does display a variety of approaches among the states.

Bureau of Justice Statistics, U.S. Dept. of Justice, Survey of Inmates in State and Federal Correctional Facilities (1997). It may be inferred that, by virtue of *Argersinger*, these were all or almost all misdemeanor offenders. The number of uncounseled misdemeanants incarcerated for breach of the conditions of their sentences is likely to be higher, because the study does not include persons confined in county jails, lock-ups and the like. Further, these statistics only give the number of persons confined at a particular moment of time. Because the terms on remand are often likely to be quite short, the number who have been confined in the course of a year will be larger. The study confirms, however, what already seems clear from the statistics provided by both Shelton and Alabama: only a small percentage of uncounseled misdemeanor defendants "end up" in prison for the breach of a conditional sentence.[16]

These numbers also are consistent with the Court's observation in *Gagnon* that, because the purpose of the probation system is rehabilitative rather than punitive, conditional sentences are revoked only as a last resort:

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[16] Shelton cites some information from the Bureau of Justice Statistics indicating that, in each of years 1996 through 1999, between 266,000 and 272,000 probationers were reincarcerated for violating the terms of their probation. Resp. Brief at 19. As Shelton points out, however, these figures include both misdemeanor probationers and felony probationers. *Id.* Similarly, Shelton's statistics concerning the percentages of probationers who had their probations terminated in 1997 and 1998 include both terminations for violations of probation conditions and those for new crimes. *Id.* at 20.

> Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.

Gagnon, 411 U.S. at 778 (*quoting* F. Remington, *et al.*, Criminal Justice Administration, Materials and Cases 910 (1968)).

B. Practical Considerations Weigh Against Requiring Counsel In Every Case In Which A State Wants To Impose (And Potentially Enforce) A Conditional Sentence.

Because statistics are not kept in a way that would allow a firm conclusion as to the dimensions of the burden a change in the law would impose, one can say with certainty only that to require a uniform regime of appointed counsel in all misdemeanor cases, or in all cases in which a term of incarceration is authorized, or even only as a condition for imposing a probated or suspended sentence of incarceration, would "impose unpredictable, but necessarily substantial, costs on 50 diverse states." *Scott*, 440 U.S. at 373.

Such a regime may also substantially limit the states' ability to impose what is now a critical tool of law enforcement in low level cases. These offenses threaten the good order of our communities but often do not seem to justify the harshness and disruption in a defendant's life that even a short term of incarceration may entail.

Conditional sentences are important tools in this intermediate range of cases. The shoplifter, motor vehicle offender, or disorderly person may be a familiar denizen of the misdemeanor or magistrate's court. After several warnings and perhaps fines, the court may conclude that it must get the offender's attention in some more vivid way and put teeth into its order by credibly threatening the citizen with jail time if he or she does not follow the conditions of the sentence. Such conditions may include restitution, as they did in this case, attending counseling sessions, or staying away from certain persons or places.

Depriving the courts of this important tool, or allowing it only at the cost of requiring appointed counsel in every case in which a state may want to impose (and potentially enforce) a conditional sentence, would impose a rigidity in the name of the Constitution that some courts and jurisdictions at least could not bear. The practical considerations clearly weigh against such a requirement.

IV. The Character Of The Probation Revocation Hearing Is Best Resolved In Later Cases.

We have argued that the Court should address and answer affirmatively the question whether an uncounseled misdemeanant on whom a conditional sentence had been imposed may in a subsequent proceeding be remanded to custody for breach of the conditions in that sentence. We do not believe, however, that the Court need go on to consider whether and when the Constitution requires that the misdemeanant be offered counsel in that subsequent proceeding and what issues may be raised in

that proceeding. The first question is necessarily implicated in the case before the Court. Because Shelton has not violated and may never violate the conditions in his sentence, the latter set of questions are entirely hypothetical.

Moreover, misdemeanor probation revocation proceedings typically take place so far below the statistical and scholarly radar that we are not now in a position to offer the Court any information about current practices and the difficulties in those practices. How frequently do states offer counsel in such cases? Should counsel be required if the original conviction was uncounseled? Would the open-ended nature of such proceedings take into account that the initial proceeding had been uncounseled? Should counsel appearing for the first time in a revocation proceeding be given some scope to question the underlying conviction? The Court ruled in *Gagnon* that some minimal process must be provided in a probation revocation proceeding, but that there was no general constitutional requirement for appointment of counsel, given the informality of the proceedings. That ruling, however, was in the context of a felony conviction in which the Constitution requires there to have been counsel at the time of conviction.

These specific issues are better considered in cases that squarely pose them.

CONCLUSION

For these reasons, the decision of the Supreme Court of Alabama should be reversed.

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In the
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,

v.

LEREED SHELTON,
Respondent.

On Writ of Certiorari
To The Supreme Court of Alabama

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN REPLY TO BRIEF OF AMICUS CURIAE CHARLES FRIED ET. AL.

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U.S. CONSTITUTION

Sixth Amendment 2, 3

ARGUMENT

I

The Sixth and Fourteenth Amendment Right to the Assistance of Counsel in "All Criminal Prosecutions" Is Not Limited to Prosecutions in Which a Term of Imprisonment Is Imposed and Carried out Immediately upon Conviction.

The Brief of Amicus Curiae by Invitation of the Court of Charles Fried, et al. (hereinafter, "Fried Brief") argues that there is no right to counsel unless the accused is "actually imprisoned at the conclusion of the proceeding" and that "actual incarceration" is a sine qua non of a Sixth and Fourteenth Amendment right to assistance of counsel. Fried Brief at 14.[1] Thus, the brief argues, if any sentence of incarceration is conditioned on future events, it is not a "loss of liberty" within the meaning of Argersinger or a "sentence to a term of imprisonment" within the meaning of Scott because the sentence "does not result in actual incarceration in that proceeding." Fried Brief at 16. This view contradicts common understandings and has perverse implications.

The Sixth and Fourteenth Amendment right to effective assistance of counsel applies in "all criminal prosecutions." Whether it applies in misdemeanor cases depends on whether the prosecution of the misdemeanor is a "criminal prosecution." More than sixty years ago, this Court

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The Court has granted NACDL permission to participate in this case as *amicus curiae*. Alabama v. Shelton, 122 S. Ct. 456 (2001).

held that whether a misdemeanor charge is "criminal" depends, among other things, on the moral depravity or gravity of the offense. District of Columbia v. Colts, 282 U.S. 63 (1930). The Court has also said repeatedly that a major gauge of stigma or seriousness is "the penalty actually authorized." Baldwin v. New York, 399 U.S. 66 (1970). The Court clearly implied, in Argersinger v. Hamlin, 407 U.S. 25 (1972), that another indicator of seriousness is the sentence actually imposed. In Argersinger, the Court held that a jail sentence, of any duration, is a sufficient gauge of seriousness to elevate a misdemeanor prosecution to "criminal" status, regardless of other factors.[2] Although its rationale was less than lucid, this Court reiterated that holding in Scott v. Illinois, 440 U.S. 367 (1979). See also, Blanton v. City of North Las Vegas, 489 U.S. 538 (1989).

It would be a sharp and momentous departure from this traditional mode of constitutional analysis for the Court to accept the Fried Brief's suggestion that no prosecution is "criminal" for Sixth Amendment purposes unless it results in a jail sentence imposed and carried out immediately. A jail sentence like that imposed by the trial court below, although never executed, is still an indication of the seriousness of the offense; it colors and characterizes the underlying conduct, and enhances the stigma attached to the offense. Accordingly, the Alabama Supreme Court was correct in equating a suspended jail sentence with a "loss of liberty" within the meaning of Argersinger or a "sentence to a term of imprisonment" within the meaning of Scott.

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2. Incarceration is obviously not by itself sufficient, since incarceration in many contexts is not "punishment." See Bell v. Wolfish, 441 U.S. 520 (1979); United States v. Salerno, 481 U.S. 739 (1987).

To hold that a jail sentence is not a jail sentence until and unless the defendant is locked in a jail cell (or perhaps in chains, on his way to jail) entirely ignores the symbolic function of a jail sentence and disturbs, if not uproots, deep traditional conceptions both of what constitutes a "sentence" and of what constitutes a "criminal prosecution" under the Constitution.

The technical distinction suggested in the Fried Brief appears to be invented for this case. Were a sentence to become a jail sentence only when actually carried out, a jail sentence stayed pending appeal would not be a jail sentence for Sixth Amendment purposes. It is difficult to see what meaningful difference there is between a jail sentence stayed (i.e., suspended) pending appeal and a jail sentence suspended pending probation. If there is a way to justify treating a prosecution leading to the stayed sentence as a criminal prosecution while denying that quality to a prosecution leading to a suspended jail sentence conditioned on probation, it has not been coherently suggested.

The Fried Brief is mistaken when it says that Argersinger is fundamentally different from the present case because Argersinger "had been sentenced to a term of incarceration directly upon his conviction." Fried Brief, at 10. In fact, Argersinger, like Respondent Shelton, received a conditional jail sentence. Argersinger's sentence was 90 days or $500.[3] It would not become an unconditional jail sentence in any arguable sense until and unless Argersinger failed or refused to pay the fine. Argersinger's jail sentence was also stayed pending disposition of his appeal and this Court's

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3. Appendix in Argersinger v. Hamlin, 407 U.S. 25 (1972), at 7.

review.[4] Jail sentences suspended on conditions of probation are not essentially different from jail sentences like Argersinger's that are also conditioned on future events such as the inability or unwillingness to pay a fine or an unsuccessful appeal. To draw the distinction suggested in the Fried Brief would create a danger of an appellate Catch-22 where appellate review of the right to counsel could be thwarted by denying trial counsel and then attaching conditions to the jail sentence imposed after the lawyerless conviction. A defendant could be denied meaningful review of such a deprivation of counsel on the ground his sentence was conditional or provisional. Then, once review was denied, the conditions could be removed and he could be packed off to jail. Suppose, for example, instead of being sentenced to 90 days or $500, Jon Argersinger had been sentenced to 90 days in jail suspended during a probationary period of 30 days (or any other period of time) and a condition of probation was that he pay a $500 fine or "costs."[5] According to Fried's argument, such a sentence would be lawful even though imposed without affording counsel. Furthermore, if Argersinger failed to pay the fine, his probation could be revoked and he could be sent to jail! The Constitutional right recognized in Argersinger could be circumvented by nothing more than the selection of virtually synonymous verbiage.

The Constitutional rights involved here cannot be so flimsy that they can be circumvented by the expedient of delaying imposition of a sentence of incarceration. If a

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4. Id. at 3.

5. Ironically, except for differences in the length of the jail terms, this is very nearly the sentence imposed on Respondent Shelton.

suspended jail sentence can be imposed without counsel, then the suspension revoked and jail imposed, both Argersinger and Scott are rendered impotent and almost meaningless. What State that wished to deny misdemeanants a right to a fair adjudication with assistance of counsel would fail to take advantage of this two-step process of circumvention? What court that cared about the Constitution would want to legitimate such shenanigans? What power would a court have to preclude such circumvention if this Court were to adopt Amicus Fried's argument? The distinction suggested by Fried should be rejected and the invitation to adopt the conceptual distinction between a sentence that is "suspended" and a sentence that is "stayed" should resolutely be resisted. Enormous complications and complexities would be generated by such thin distinctions, injecting confusion into a process that this Court sought to clarify in Argersinger and Scott.

II

Practical Considerations Do Not Support the Claim that States Must Be Entitled to Revoke Conditional Jail Sentences Which Have Been Imposed Without Affording the Right to Assistance of Counsel.

Amicus Fried cites data suggesting that there were more than 8.7 million misdemeanor cases filed in state courts in 1999 (Fried Brief at 18) and that in recent years between 1.4 million to 1.8 million adults were on probation for misdemeanors. Id. at 20. He also cites data suggesting that only a small percentage, perhaps a fraction of one percent, of misdemeanants placed on probation are ever incarcerated for violating probation. Id. at 20-21. From this, he deduces that to require appointment of counsel for indigents "as a condition of imposing a probated or suspended sentence of

incarceration" would impose substantial costs on the states. Id. at 22. To the extent this suggests that these are new costs that the states were not already bearing without complaint prior to the State's petition for certiorari in this case, however, it has no support in the data. No data have been cited by any party that seriously suggest that affirming the decision below will disturb the status quo or general practice anywhere. There is no basis for a belief that any new or additional burdens on the States' finances are at issue in this case.[6]

The data do not remotely support Amicus' implicit argument that considerations of cost support the claim that "the States must be entitled to revoke conditional sentences" (Id. at 18). Although we are inclined to agree with Amicus Fried that "It makes no sense to conclude, as Alabama argues,

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6. The Fried Brief apparently assumes that of the million plus misdemeanor cases annually ending in probation, all involved adjudications of guilt and all involved suspended jail sentences. See Fried Brief at 19-21. It is not clear to us that such was the case. Many of those counted as having received probation may actually have been diverted to probationary programs without having been adjudicated guilty. In such a case, there would not be any constitutional impediment to offering such pretrial diversions to defendants who are not provided counsel. There does not appear to be any basis for estimating how many of those who receive probation under contemporary approaches do so with the assistance of court-supplied counsel nor is there a basis for projecting how many would fall into that category were this Court to hold that no suspended jail sentences can be imposed without affording counsel. In any event, as we argue infra, the states are free to employ diversionary probation without providing counsel, if they insist on doing so.

that a conditional sentence may be imposed but may not be carried out" (Id. at 4), whether the state should be permitted to impose sham jail sentences is a different issue from whether it should be permitted by the Constitution to convict defendants of crime and send them to jail without having afforded them counsel at their trial. None of the parties or the states who have appeared here as amici curiae have espoused the view advanced by Amicus Fried at the invitation of the Court that the states should be permitted to revoke conditional jail sentences imposed without counsel. Nor has anyone, other than Amicus Fried, suggested that considerations of expedience, cost or any other "practical consideration" justify jailing defendants who were convicted without having been afforded counsel. If, as Amicus Fried suggests, only a tiny fraction of the probationary sentences imposed in misdemeanor cases actually end up in incarceration -- perhaps less than a few thousand per year in the entire country -- no legitimate "practical considerations" could warrant permitting those incarcerations without assuring the right to counsel. Very possibly, all or virtually all of those misdemeanants imprisoned following probation revocations in the recent past were provided counsel or supplied their own at both the guilt adjudication stage and the probation revocation stage. If so, no new expenses will be generated by affirming the judgment below. If not, the expenses will still be an insignificant price to pay for what this Court has said are "necessities, not luxuries" and "essential to a fair trial." Gideon v. Wainwright, 372 U.S. 335 (1963).

III

The Decision below Does Not Require Any State to Provide Counsel to Indigents Accused of Misdemeanors Before Imposing Probation, It Merely Precludes Conditional Jail Sentences Without Affording Counsel.

Amicus Fried argues that probation cannot be employed in cases where defendants are not afforded counsel unless the states are free to link probation to a conditional jail sentence. Fried Brief at 7, 22. He is supported in this by the ill-advised concession of Respondent Shelton that "Probation must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective." Respondent's Brief, at 17, quoted by Fried, at 7. As we show in our Appendix hereto, however, this assumption is erroneous. There is a way, currently employed by many states, to use probation effectively without linking it to the threat of revocation and incarceration. Under these approaches, if probation is unsuccessful, the defendant is simply prosecuted.

At least twenty-three states presently have legislation in place which allows probation to be imposed on minor offenders in lieu of adjudication. Under these schemes, if the defendant violates probation, he is not sentenced, he is merely returned to the criminal process for normal adjudication. This accomplishes the rehabilitative function of probation without the unfairness (and unreliability) of adjudicating guilt without assistance of counsel. Since such probation is the result of agreement and is probably not even "punishment," it can be imposed without the expense of appointing attorneys for every indigent defendant for whom the program is made available. It is in all respects a fairer and more sensible compromise than that suggested by the Fried Brief.

A fuller exposition of existing statutory diversion schemes is annexed hereto in an appendix. It is by no means clear, however, that explicit statutory authorization is even required for the use of probation in lieu of adjudication. Prosecutors are free to work out some informal probationary schemes such as dismissals subject to reinstatement should the defendant violate agreed conditions of behavior. See United States v. Smith, 354 A.2d 510 (D.C.C.A. 1976).

It is clear, therefore, that all states are free under the interpretations of Argersinger and Scott espoused by Respondent and by the court below, to impose probation upon criminal defendants in misdemeanor cases without providing them with counsel. Depriving a defendant of the benefits of a lawyer while determining his guilt or innocence is in no sense a necessary condition of utilizing probationary schemes. There is, therefore, neither a sensible conceptual nor a grounded practical or expedient argument against the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Survey of Pretrial Probation Programs

Twenty-three states, but not Alabama, have a form of pretrial probation for minor offenses, generally called Pretrial Intervention ("PTI") or Pretrial Diversion ("PTD"). There are minor variations among states but the general outline of the programs is the same throughout. Both the prosecution and defense must agree to the defendant's enrollment in the program. The defendant waives his right to a speedy trial and the prosecution against him is deferred pending his completion of the program. The defendant must adhere to requirements similar to terms of probation (and in fact in some states it is called probation) for a period of time. If he completes the program, the case against him is dismissed and his record shows no conviction or admission of guilt; if he violates the terms of probation or decides to leave the program, the prosecution against him is resumed. These programs are often limited to first-time offenders, those charged with minor or non-violent offenses, or to offenders whom the court deems not likely to repeat the offense and whose enrollment in a PTI program serves the interests of justice.

Six states, including Alabama, have a PTI or PTD program that applies to only a small class of cases, such as drug offenses or domestic violence. Alabama's program is limited to drug offenders.

I.
States With General PTI or PTD Programs

1. CONNECTICUT: "Accelerated Pre-trial Rehabilitation": Conn. Gen. Stat. § 54-56e.
2. PENNSYLVANIA: "Accelerated Rehabilitation Disposition": Pa. R. Crim. P. 310-320.
3. MISSISSIPPI: "Pretrial Intervention Program (PTI)":

Miss. Code §§ 99-15-101 to 99-15-127.

4. NEW JERSEY: "PTI": N.J. Stat. §§ 2c:43-12 to 2c:43-13.

5. FLORIDA: Fla. Stat. ch. 948.08. There is also a special program for drug offenders. Fla. Stat. ch. 948.16.

6. GEORGIA: "Pretrial diversion program (PTD)": Ga. Code § 15-18-80.

7. OHIO: "PTD": Ohio Rev. Code § 2935.36.

8. SOUTH CAROLINA: "PTI": S.C. Code §§ 17-22-10 to 17-22-170.

9. KANSAS: "PTD": Kan. Crim. Proc. Code §§ 22-2907 to 22-2911.

10. KENTUCKY: "PTD": Ky. R. Crim. P. 8.04.

11. NEBRASKA: "PTD": Neb. Rev. St. §§ 29-3601 to 29-3604.

12. TENNESSEE: "PTD": Tenn. Code § 40-15-105.

13. CALIFORNIA: Cal. Penal Code § 1001.1-9. Also a separate pretrial diversion drug court program for drug offenders. Cal. Penal Code § 1000.5.

14. INDIANA: "PTD": Ind. Code § 33-14-1-7.

15. MASSACHUSETTS: "PTD": Mass. Gen. Laws ch. 276A §§ 1-9.

16. MINNESOTA: "PTD": Minn. St. § 401. 065.

17. MONTANA: "PTD": Mont. Code § 46-16-130.

18. UTAH: "PTD": Utah Code §§ 77-2-5 to 77-2-9.

19. NEW MEXICO: N.M. St. §§ 31-16A-1 to 31-16A-8.

20. VERMONT: Vt. Stat. tit. 3, § 164.

21. WYOMING: Wyo. St. § 7-13-301.

22. OREGON: Or. Rev. St. §§ 135.881 to 135.901.

23. ARIZONA: Ariz. Rev. St. §§ 11-361 to 11-365.

II

States With PTI or PTD Programs in Only a Small Class of Cases

1. ALABAMA: Alabama's Alcohol and Drug Abuse Court Referral and Treatment Program permits drug offenders to enroll in treatment programs in lieu of prosecution, subject to the prosecutor's approval. Ala. Code § 12-23-5.

2. WISCONSIN: Those charged with domestic abuse offenses may enter into deferred prosecution agreements prior to trial. Wisc. Stat. § 971.37.

3. LOUISIANA: Louisiana's pretrial diversion program is limited to those charged with driving while intoxicated. La. Rev. Stat. § 15:578.1.

4. OKLAHOMA: Oklahoma's Restitution and Diversion Program, Okla. Stat. § 991f-1.1, applies only to property crimes, and the requirements of completing the program are limited to payment of restitution rather than the broader range of probation-like requirements used in general PTD programs.

5. COLORADO: In Colorado a program is available for those accused of child abuse or neglect. Colo. Rev. Stat. § 19-3-310.

6. ILLINOIS: Illinois law authorizes each judicial circuit to establish a drug court program which may provide for pre-adjudicatory diversion agreements, whereby the prosecution is suspended pending successful completion of a drug treatment program, as well as a post-adjudicatory treatment program. Ill. Stat. ch. 730 § 166/1 to 35.

7. ARKANSAS: Arkansas law permits judicial districts to establish pre- or post-trial diversion programs for drug treatment. Ark. Code § 16-98-201.